

1 VIDEOTAPED DEPOSITION OF BERND G. HEINZE
2 February 8, 2023
3 UNITED STATES DISTRICT COURT
4 MIDDLE DISTRICT OF TENNESSEE
5 NASHVILLE DIVISION
6

7 -----
8 TRACTOR SUPPLY COMPANY,)
9 vs.) NO. 3:21-cv-00619
10 ACE AMERICAN INSURANCE)
11 COMPANY UNIFIRST CORPORATION)
12 AND ESIS, INC.,)
13 Defendants.)
14 -----
15 APPEARANCES:
16 FOR THE PLAINTIFF:
17 MARK M. BELL, ESQ.
18 ANDREW A. WARTH, ESQ.
19 Attorney at Law
20 Waller Lansden Dortch & Davis, LLP
21 511 Union Street
22 Suite 2700
23 Nashville, Tennessee 37219
24 (615)244-6380
25 mark.bell@wallerlaw.com
26
27 FOR THE DEFENDANTS:
28 ANDREW J. PULLIAM, ESQ.
29 J. GRAHAM MATHERNE, ESQ.
30 Attorney at Law
31 Wyatt Tarrant & Combs LLP
32 333 Commerce Street
33 Suite 1050
34 Nashville, Tennessee 37201
35 (615)251-6675
36 apulliam@wyattfirm.com

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800-556-8974
www.veritext.com

1 APPEARANCES, cont'd:
2 ALFRED C. WARRINGTON V, ESQ.
3 Attorney at Law
4 Clyde & Co. US LLP
5 1221 Brickell Avenue
6 Suite 1600
7 Miami, Florida 33131
8 (305)329-1799
9 alfred.warrington@clydeco.us

10 STEVEN W. ELLIOT, ESQ.
11 Attorney at Law
12 Howell & Fisher, PLLC
13 3310 West End Avenue
14 Suite 550
15 Nashville, Tennessee 37203
16 (615)921-5224
17 selliott@howell-fisher.com
18 JEREMY R. GOOLSBY, ESQ.
19 Attorney at Law
20 Frost Brown Todd LLP
21 250 3rd Ave. S.
22 Suite 1900
23 Nashville, Tennessee 37201
24 (615)251-5583
25 jgoolsby@fbtlaw.com

ALISSA K. CHRISTOPHER, ESQ.
JAMES B. HARPER, ESQ.
Attorney at Law
Cozen O'Connor
1717 Main Street
Suite 3100
Dallas, Texas 75201
(214)462-3036
akchristopher@cozen.com

Also Present: David Drumel, Videographer

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1 (On record at approximately 9:08 a.m. CT.)
2
3

4 THE VIDEOGRAPHER: Good morning. We are
5 going on the record at 9:08 a.m. on February 8th,
6 2023. Please note that this deposition is being
7 conducted virtually. Quality of recording depends
8 on the quality of the camera and the internet
9 connection. What is seen from the witness and
10 heard on the screen is what will be recorded.
11 Audio and video recording will continue to take
12 place unless all parties agree to go off the
record.

13 This is Media Unit 1 in the
14 video-recorded deposition of Bernie Heinze taken
15 by counsel for the Plaintiff in the matter of
16 Tractor Supply Company versus ACE American
17 Insurance Company, et al., filed in the United
18 States District Court for the Middle District of
19 Tennessee, Nashville Division, case number
20 321-CV-00619.

21 This deposition is being held via Zoom.
22 My name is David Drumel, I am the videographer
23 with Veritext. The court reporter is Kelly
24 Forfar.

25 Counsel, please state your appearances

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1 for the record which will then be followed by the
2 swearing of the witness by the court reporter.

3 MR. BELL: Good morning, I am Mark Bell
4 on behalf of Tractor Supply, I am also joined by
5 Drew Warth.

6 MR. WARRINGTON: Al Warrington for ACE
7 American and I am joined by Ms. Panelo.

8 MS. CHRISTOPHER: Alissa Christopher for
9 ESIS, Inc. and James Harper also for ESIS, Inc.

10 MR. PULLIAM: Andy Pulliam and Graham
11 Matherne for UniFirst Corporation.

12 THE COURT REPORTER: I am sorry, Andrew
13 and who?

14 MR. PULLIAM: Graham Matherne.

15 THE COURT REPORTER: Thank you.

16
17 BERND G. HEINZE,
18 having first been duly sworn, was examined and
19 testified on his oath as follows:

20
21 THE WITNESS: Good morning, Mark.

22 EXAMINATION

23 BY MR. BELL:

24 Q. Hey, good morning, Mr. Heinze, and how
25 are you doing this morning?

1 A. I am well. And you?

2 Q. Doing well, thank you.

3 A. Good.

4 MR. BELL: Before we begin, I just want
5 to put a couple items on the record, two
6 stipulations that we have, which is the first, an
7 objection as to one party is good for all parties;
8 and second, all objections other than to form are
9 reserved.

10 Also, Alissa and Mr. Heinze, I understand
11 that you want to read and sign. Just want to make
12 sure --

13 THE WITNESS: Yes, please.

14 MR. BELL: -- that is okay with everyone.

15 MS. CHRISTOPHER: Yes.

16 MR. PULLIAM: Yes.

17 MR. WARRINGTON: Mark, I would just also
18 add that we have that standing objection with
19 respect to claims handling issues given the
20 Court's Order in dismissing the bad faith claims.

21 MR. BELL: Understood.

22 THE COURT REPORTER: All right. I am
23 sorry, claims handling in this case, what was the
24 end of that?

25 MR. WARRINGTON: Yeah, sorry. We have a

1 standing objection with respect to whether inquiry
2 into claims handling as to ACE is appropriate
3 because the bad faith claims have been dismissed.

4 THE COURT REPORTER: Thank you.

5 MR. BELL: And noted on -- on that
6 objection, and obviously we note our disagreement
7 with the objection, but understood.

8 BY MR. BELL:

9 Q. Mr. Heinze, this is not your first rodeo,
10 I understand?

11 A. That's correct.

12 Q. Okay. Do you have any questions about
13 the ground rules of a deposition?

14 A. No, sir.

15 Q. Okay. How many depositions -- between
16 taking and being a deponent, how many depositions do
17 you think you have done?

18 A. As a deponent probably I think it is now
19 up to around 110, maybe 115. In terms of taking,
20 probably over 5, 600.

21 Q. Okay. I am not -- I am not going to tell
22 you anything new other than just to ask is there
23 anything that would affect your ability to testify
24 truthfully and honestly today?

25 A. No, sir.

1 Q. Okay. Now you have been qualified as an
2 expert in other cases; is that right?

3 A. Yes, sir.

4 Q. And what -- what topics have you been
5 qualified on?

6 A. It ranges with regard to the issues of
7 claims handling practices, the duty of good faith and
8 fair dealing, generally accepted customs and practices
9 of the insurance industry and the standard of care,
10 matters involving directors and officers, general
11 liability, products liability, policies; it really runs
12 the gamut, Mr. Bell, with regard to, if you take a look
13 at Exhibit B to my Report, a variety of different
14 matters and cases across the country, but most all of
15 them relate to insurance and insurance coverage
16 matters.

17 Q. Okay. Have you ever been limited by a
18 court as an expert witness?

19 A. Yes.

20 Q. And in what respects have you been
21 limited?

22 A. Where I have been instructed by counsel
23 to render an opinion on either a legal issue,
24 interpretation of a statute, interpretation of a policy
25 provision, or where I have rendered an opinion that

1 counsel's behaviors were not in keeping with the
2 American Bar Association's Code of Professional
3 Responsibility.

4 Q. And then have you ever been excluded as
5 an expert witness?

6 A. No, sir.

7 Q. And then you mentioned the -- I think one
8 of the items you mentioned was the interpretation of a
9 policy provision; is that right?

10 A. Yes, sir.

11 Q. Okay. And -- and why -- why have you
12 been limited on the interpretation of a policy
13 provision?

14 A. That really is something that remains
15 within the purview of the court and is not something
16 that would be permissible for expert witness opinion
17 unless a court leave was sought and permission granted
18 by the trial court. It was done at the request of
19 counsel, I understand the instructions, but since
20 counsel for the adverse party had also commented on
21 those things, I was asked to do so as well and the
22 court excluded both of those opinions.

23 Q. Gotcha.

24 In -- in your report here in this case,
25 did you interpret any policy provisions?

1 A. No. But I have reserved my right, as I
2 note in the Report, Mr. Bell, to do so if Mr. Fey is
3 permitted to testify on those matters as well.

4 Q. And I understand you reserved your right
5 to do so. Did -- did your opinion itself express any
6 opinions on the interpretation of the policy
7 provisions?

8 A. No, only to the extent where I referenced
9 various contractual provisions of the Risk Management
10 Services Agreement or the Textile Services Agreement
11 relating to flat goods or the general liability service
12 instructions as they inform the generally accepted
13 customs and practices of the duties and
14 responsibilities of ESIS in its role as UniFirst's
15 third-party administrator.

16 Q. But as far as the formal interpretation,
17 the policy should have provided coverage, the policy
18 shouldn't have provided coverage, you didn't express
19 any opinions on those issues directly?

20 A. It is beyond the scope of my retention,
21 Mr. Bell. It wasn't anything that ESIS did in its
22 activities with regard to acting as a third-party
23 administrator for UniFirst and, therefore, was really
24 nothing on which comment or opinion was sought from the
25 folks at ESIS.

1 Q. Got it. Let me ask you this, Mr. Heinze.
2 What -- and I think you referenced that in potentially
3 Tennessee or potentially Florida, and -- and what law
4 applies to this dispute?

5 A. That's something that the Court will need
6 to determine, Mr. Bell.

7 MR. PULLIAM: Object to the form.

8 THE COURT REPORTER: I am sorry, I didn't
9 catch who said that.

10 MR. PULLIAM: Andy Pulliam, I was
11 objecting to the form but I didn't beat Mr.
12 Heinze's response.

13 MR. BELL: Sorry, Andy, did you say you
14 didn't hear Mr. Heinze's response?

15 MR. PULLIAM: I said I didn't beat his
16 response to put my objection in before he said it.

17 MR. BELL: Oh, gotcha, okay.

18 BY MR. BELL:

19 Q. Understood on that as far as the
20 applicable law.

21 Did you -- in coming to your conclusions,
22 did you apply any applicable law?

23 A. In my Report, Mr. Bell, I laid out what I
24 understand as a claims professional and in my role as
25 an expert witness here what the common law and statutes

1 are of the states of Tennessee and Florida as they
2 pertain to the allegations contained within Tractor
3 Supply's Third Amended Complaint against ESIS. But
4 that was only done for the standpoint of informing
5 generally accepted insurance customs and practices and
6 the role in which ESIS played in regard to undertaking
7 its administrative activities on behalf of UniFirst
8 pursuant to the Risk Management Services Agreement and
9 only to the effect that I would reserve the right to
10 comment upon the issues that are -- the allegations
11 that are made against ESIS as those common law cases
12 and/or statutory issues might pertain.

13 Q. Okay. And so you -- you mentioned
14 Tennessee and Florida; is that right?

15 A. Yes, sir.

16 Q. You didn't mention Massachusetts, did
17 you?

18 A. No, sir.

19 Q. Did you look at anything related to
20 Massachusetts?

21 A. No, sir.

22 Q. Did you look at anything related to the
23 common law of Massachusetts?

24 A. Not with regard to this case, no. I have
25 testified in Massachusetts before on matters that are

1 similar to those that are at issue here.

2 Q. Do you know offhand what the -- what the
3 applicable standards would be in Massachusetts?

4 A. With regard to what?

5 Q. With regard to any of the matters that
6 you opined on?

7 A. Well, that is a very large area, a rather
8 large swath of things that I have opined upon. If it
9 relates to the duties and responsibilities of a
10 third-party administrator as ESIS was undertaking in
11 its contractual role here with UniFirst, I believe that
12 based upon my experience and also acting as a
13 third-party administrator now of matters that are
14 coming out of the Commonwealth of Massachusetts, that
15 they will be the same as I have opined in my Report.

16 Q. Okay. But you didn't specifically
17 reference anything related to Massachusetts in your
18 Report, correct?

19 A. Correct. I have reserved my right to
20 supplement my Report as additional matters come to my
21 attention or as I am asked to do so by counsel.

22 Q. And did you say that you act as a TPA in
23 Massachusetts?

24 A. I act as a TPA here in Pennsylvania but
25 our territory runs from the state of Maine down to

1 Virginia and west to Ohio.

2 Q. Tell me about that TPA role that you
3 currently have.

4 A. Sure. We serve as a third-party
5 administrator for an insurance carrier or also for
6 various syndicates at Lloyd's on a one-off basis or on
7 a line of business portfolio perspective.

8 Q. Okay. And you said it is a Lloyd's
9 syndicate?

10 A. A variety of Lloyd's syndicates will
11 contact us from time to time to undertake third-party
12 administrative activities and serve as a claims
13 administrator on their behalf since they do not have
14 claims operations in the United States. But the other
15 matter that we have had since 2002 relates to a
16 domestic insurer in Georgia, and that's the territory
17 that I was describing earlier, Mark, that we handle
18 from Maine down to Virginia, west to Ohio.

19 Q. Gotcha, okay.

20 So you have got the various Lloyd's
21 syndicates, the 2000 -- or the domestic insurer
22 in Georgia; any other parties for whom you perform TPA
23 services?

24 A. No, that's it.

25 Q. Okay. And for the Lloyd's syndicate, is

1 it the same region that you are involved with as -- as
2 it is for the domestic insurer in Georgia?

3 A. No, that's nationwide.

4 Q. Gotcha.

5 And the TPA claims for the Lloyd's
6 syndicate, are they -- what type of lines, is it
7 specialty lines?

8 A. It is mostly specialty lines but on the
9 property side.

10 Q. Okay, got it.

11 And what about on -- for the domestic
12 insurer?

13 A. Also property, first party property.

14 Q. First party property, okay.

15 A. There are a few liability ones in there
16 as well but in the main it is all first party property.

17 Q. Gotcha.

18 And -- and your role as TPA, are you all
19 doing scene investigations, preparing estimates or what
20 is your -- what is the scope of your role as a TPA for
21 those two carriers?

22 A. We serve as the TPA for the carriers and
23 then we retain independent adjustors or general
24 adjustors on the ground to undertake the scene
25 investigations and provide that information to us that

1 we then review and evaluate, establish reserves and
2 provide our reports to the carrier under whose contract
3 we are operating.

4 Q. Gotcha, okay.

5 And who is the domestic insurer in
6 Georgia?

7 A. AXIS Insurance Company.

8 Q. A X I S?

9 A. Yes.

10 Q. And AXIS, are they -- they are a division
11 of someone; who -- is it -- I thought at least. Are
12 they part -- part of AXA or is it separate?

13 A. No, AXA is a different insurance company
14 that is domiciled in Paris, France and has operations
15 throughout Europe and some here within the United
16 States domestically, but primarily they are run out of
17 Paris and the AXA Versicherung Aktiengesellschaft in
18 Cologne, Germany.

19 THE COURT REPORTER: I am sorry, you are
20 going to have to slow way -- go back and say that
21 company.

22 THE WITNESS: I will give -- I will give
23 you the spelling at a break, Kelly.

24 THE COURT REPORTER: Can you just say it
25 slower so I can write it phonetically at least?

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1 THE WITNESS: Sure. AXA Versicherung,
2 V E R S I C H E R U N G, Aktiengesellschaft,
3 A K T I E N G E L L S C H A F T [sic].

4 THE COURT REPORTER: Thank you.

5 THE WITNESS: You're welcome.

6 BY MR. BELL:

7 Q. And the TPA work that you are doing on
8 behalf of those insurers, is that within the Heinze
9 Group, LLC?

10 A. Yes, yes.

11 Q. Okay. And how many people work for the
12 Heinze Group, LLC?

13 A. Nine.

14 Q. And you are president and CEO?

15 A. Yes. And we will use -- when we do our
16 audits we will use 1099 people on the side, Mark. We
17 will get people that are specialists or experts in
18 particular lines of business when we do our audits of
19 the various insurance companies or TPAs or MGAs.

20 Q. And then of these nine employees, how
21 many of them do expert witness-related work?

22 A. Just me.

23 Q. Just you, okay.

24 And then the other eight, is it all TPA
25 work, or what do the other eight do?

1 A. The other eight also assist with the TPA
2 activities, and then we also have an association
3 management function that we run and their primarily
4 responsibilities go with regard to that function of the
5 operation.

6 Q. Gotcha.

7 And when you say "association
8 management," what do you -- what do you mean by that?

9 A. We represent a number of nonprofit
10 professional trade associations.

11 Q. I got it. Like IIABA or something like
12 that, the Big "I"?

13 A. Correct.

14 THE COURT REPORTER: The I -- say that
15 one more time, Mark.

16 MR. BELL: The Big "I."

17 THE COURT REPORTER: But you said AI --

18 MR. BELL: IIABA.

19 THE COURT REPORTER: Thank you.

20 BY MR. BELL:

21 Q. And -- and what is -- tell me about that
22 association management role, what does -- what does
23 that entail?

24 A. Essentially we are the back office of the
25 professional trade association. We will do everything

1 from managing the website to undertaking meetings,
2 trade shows, membership development, newsletters,
3 promotional activities, making sure that all of the
4 continuing legal education or continuing education
5 activities are properly certified by all 50 state bar
6 associations or 50 state insurance companies; we are
7 accredited by all 50 state insurance departments.

8 I am an accredited and approved provider
9 and instructor by all 50 state insurance companies, so
10 we will do everything from cradle to grave for the
11 various trade associations as though they were doing it
12 themselves but have outsourced that function to us,
13 much like carriers or private companies like UniFirst
14 have done with TPAs.

15 Q. Gotcha, okay.

16 And are those all insurance trade
17 associations?

18 A. No.

19 Q. Okay. And how many -- how many
20 associations is it roughly?

21 A. Currently or in the past?

22 Q. Currently?

23 A. Currently three.

24 Q. And who are those associations?

25 A. The Federation of Defense and Corporate

1 Counsel, the International Furnishings and Design
2 Association and the California Insurance Wholesalers
3 Association.

4 Q. Do you -- do you represent policyholders?

5 A. Yes.

6 Q. And did -- tell me about that role
7 representing policyholders.

8 A. I don't represent them as counsel,
9 however as part of my expert witness services, I am
10 called upon from time to time to review matters
11 involving people that are policyholders against
12 insurance companies which -- which I will accept so
13 long as there is no conflict.

14 Q. Got it.

15 And when you were in private practice,
16 did you represent policyholders?

17 A. Very limited basis, Mark. I would say
18 that at most it was 5 percent.

19 Q. Gotcha, okay.

20 Because looking through -- if I am
21 looking through your recent history of retentions,
22 there is a Varney Agency; was that on -- was that a
23 failure-to-procure type case or something?

24 A. That is exactly right.

25 Q. Okay. And were you retained by the -- I

1 guess that would have been the -- the agency itself in
2 a claim for failure to procure?

3 A. By the retail agency, that is exactly
4 right.

5 Q. Okay. And then the others are -- look
6 like they are all insurers --

7 A. No, there are some policyholders in there
8 as well, Mark. Would you like me to go through them?

9 Q. No, no. But I was just going to get back
10 it -- it looks like 20 -- I was just starting from --
11 from the start -- from the most recent and going back.
12 And then there is a John Robert Sebo?

13 A. Yes.

14 Q. Is that -- is that a -- that is a policy
15 holder?

16 A. That's correct.

17 Q. I know that case. We will talk about
18 that on the break; unrelated.

19 A. Okay.

20 Q. But -- okay. So that is a policyholder.
21 And, then, just looking back at the last five -- if you
22 look back at the last five years, who are the other
23 policyholders?

24 A. Would you mind if I look at my Report?

25 Q. Yeah, yeah, please do. In fact, we will

1 go ahead and mark that and introduce it as an exhibit;
2 it is going to be Exhibit 425.

3 Do you have a -- Mr. Heinze, do you have
4 a hard copy of it also, or are you just using the one
5 on the screen?

6 A. I do. And actually 425, Mark, is the
7 Deposition Notice.

8 Q. I am sorry, it should be -- it is
9 actually the -- it is the Disclosure -- sorry. It is
10 the ESIS Disclosure and then it includes the Report
11 beginning on page 6.

12 A. You are absolutely right.

13 Q. No worries, it looked liked a Deposition
14 Notice at first. But, sorry, there are some other --
15 some unfamiliar documents, I imagine, at the front of
16 that that are not yours.

17 A. That is absolutely fine; not to worry.

18 THE COURT REPORTER: So 425 is going to
19 be -- what is the -- how do I find it?

20 MR. BELL: I just called it the Heinze
21 Expert Report.

22 THE COURT REPORTER: Okay.

23 (Exhibit 425 - Heinze Expert Report.)

24 THE WITNESS: With regard to past
25 testimony, I am just looking back here over the

1 last five years, it looks like the Sebo case was
2 the only one in which deposition or trial
3 testimony has been offered. The other ones have
4 not reached the deposition stage quite yet --

5 BY MR. BELL:

6 Q. Okay, got it.

7 A. -- or were amicably resolved short of
8 that.

9 Q. Do you have any current engagements for
10 policyholders?

11 A. Yes.

12 Q. Okay. How -- how many currently?

13 A. Let me take a quick look.

14 Five.

15 Q. Five, okay. And in what -- what -- what
16 type of matters are those, and what type -- what are
17 those types of engagements; is it TPA-related work or
18 what -- can you describe just basically at a broad
19 level what they are.

20 A. Sure. As I look through them, most all
21 of them, Mark, relate to claims handling practices; the
22 generally accepted insurance industry customs and
23 practices; the duty of good faith and fair dealing; and
24 there is a property claim with regard to the -- a fire
25 in a manufacturing facility, there are actually two of

1 those; and then the others relate just to insurance and
2 insurance-related matters involving claims handling
3 activities.

4 Q. Okay. And then -- so you -- you -- today
5 you personally handle claims as a TPA?

6 A. Yes.

7 Q. And how long have you been handling
8 claims for?

9 A. How long have I been handling -- I was
10 not sure if you were done with your question. How long
11 have I been handling claims for?

12 Q. Yes.

13 A. Since 1983.

14 Q. Okay.

15 A. Since I started as an attorney.

16 Q. And correct me if I am wrong on this,
17 you -- you have experience handling claims as an
18 attorney and then also as a -- working for an insurer
19 and also as a TPA; is that right?

20 A. Yes, sir.

21 Q. Okay. Do you have any insurance
22 designations?

23 A. No.

24 Q. Let me ask this. I think you referenced
25 them in your Report, the Florida Unfair Claims

1 Settlement Practices Act and the Tennessee Unfair
2 Claims Settlement Practices Act; is that correct?

3 A. Yes.

4 Q. Did that -- did the -- did the Unfair
5 Claims Settlements Practices Acts influence your
6 opinions?

7 A. They were relevant to what I reviewed and
8 examined as regard to commenting upon the propriety of
9 the allegations contained within Tractor Supply's Third
10 Amended Complaint.

11 Q. And did you find anything that was in --
12 was not in compliance in keeping with either of those
13 Unfair Claims Settlement Practices Acts?

14 A. As far as ESIS was concerned, no.

15 Q. What about as far as anybody else was
16 concerned?

17 A. I was not retained to look at anyone
18 else's activities or services other than those of ESIS.

19 Q. Gotcha.

20 And I understand you may not have been
21 retained for that but did you -- in reviewing the
22 materials did you come to any conclusions related to
23 any other parties?

24 A. No, sir.

25 Q. Okay. Did you -- in reviewing the

1 materials did you come across anything that seemed odd
2 or atypical in -- in the handling of the claims,
3 whether by ESIS or anybody -- any other party?

4 A. I am just taking a pause to think, Mark.
5 I mean, I have reviewed probably close to 50,000 pages
6 of this record. And reflecting back on all of it, I
7 honestly don't have any recollection of anything that I
8 saw that struck me as being outside of compliance, odd
9 or unusual with regard to this kind of a high
10 deductible insurance program and the matter in which
11 the parties under their respective contracts operated
12 with one another or the manner in which the claims were
13 being administered.

14 Q. Okay. You don't remember seeing any
15 e-mails that you thought, oh, that seems -- that seems
16 a little out of the norm?

17 A. No.

18 Q. Let me ask you this. You mentioned that
19 this is typical for how a -- a policy with a high
20 deductible is handled; is that right?

21 A. Yes.

22 Q. Let me ask you this. Typically when you
23 have a high deductible plan, the TPA -- is the TPA
24 retained by the insurer or the insured in -- in a high
25 deductible plan, not high self-insured retention plan?

1 A. It depends.

2 Q. What -- what is typical?

3 A. It depends upon whether the insurance

4 carrier has its own claim department or is outsourcing

5 a particular book of business or a particular insured

6 to a third-party administrator; it depends upon whether

7 the insured itself has a risk management or claims

8 department and is undertaking those activities on its

9 own or outsourcing those to a third-party

10 administrator. I couldn't say which one was more

11 typical than the other; I have seen it both ways. At

12 Reliance we had self-insured retention policies; we had

13 high deductible policies, as the one that is at issue

14 here; and we had TPAs that were responding on behalf of

15 both the insured; and at times we would have a TPA

16 called Sterling that we would utilize for the handling

17 of those, usually the SIR programs, the higher SIR

18 programs.

19 Q. Okay. And you said that the -- in

20 some -- or I think you said this.

21 And if ever I say you said something, I

22 am not trying to say something incorrect. So if I ever

23 say you said something and it is incorrect, please do

24 correct me.

25 But I thought that you had said

1 that the -- that in many instances the -- the insurer
2 may outsource to a TPA; is that right?

3 A. Yes.

4 Q. And is that what happened in this case?

5 A. No, the insured outsourced to a
6 third-party administrator here.

7 Q. Okay. And then who did the investigation
8 and claims handling on behalf of the insurer?

9 A. Well, the insurer, if referring to ACE or
10 referring to Tractor Supply's insurer?

11 Q. ACE.

12 A. At ACE. The way the high deductible
13 program worked is that the investigation would be
14 conducted by ESIS.

15 Q. So the investigation is conducted by
16 ESIS --

17 A. -- on behalf of UniFirst.

18 Q. -- on behalf of UniFirst, right.

19 A. Correct.

20 Q. And that's not -- that's not problematic
21 that the -- that the named insured's TPA is doing the
22 investigation for an additional insured on the policy?

23 MR. WARRINGTON: Form.

24 MS. CHRISTOPHER: Object to form.

25 THE WITNESS: That's a different

1 question. It is not unusual, excuse me, for a
2 third-party administrator to undertake an
3 investigation of the underlying facts and
4 circumstances to determine liability with regard
5 to the accident that is allegedly having been
6 reported to the Tractor Supply folks of someone
7 having fallen or tripped or becoming injured by
8 one of UniFirst's mats while they were at the
9 Tractor Supply location.

10 The issue with regard to investigating
11 additional insured status was done by ACE.

12 BY MR. BELL:

13 Q. And who did that investigation on ACE's
14 behalf?

15 A. ACE employees.

16 Q. What is your -- what gives you the
17 understanding that ACE employees did the investigation
18 into coverage for the additional insured?

19 A. That was something that was consistent
20 within the testimony of the depositions and consistent
21 in the e-mails that I saw with regard to the activities
22 to determine whether Tractor Supply could be afforded
23 additional insured status on the claims that were
24 reported.

25 Q. Would it be improper for ESIS to have

1 done the investigation into additional insured
2 coverage?

3 MR. WARRINGTON: Form.

4 THE WITNESS: Well, it didn't --

5 THE COURT REPORTER: Wait, who said form?

6 Was that you, Al?

7 MR. WARRINGTON: Yes.

8 THE COURT REPORTER: Thank you.

9 THE WITNESS: It -- it didn't undertake
10 those investigations, it limited its investigation
11 with regard to the liability of UniFirst based
12 upon the claims that were reported to Tractor
13 Supply.

14 The issues involving investigations of
15 additional insured status was undertaken by Marcia
16 Flagg and others at ACE Insurance Company.

17 BY MR. BELL:

18 Q. Did you say Marcia Flagg at ACE?

19 A. I am sorry. No, I am sorry, she was at
20 ESIS. I apologize. By people at -- at ACE.

21 I think I remember Brooke Skolnik's
22 deposition testimony that all of the activities
23 relating to additional insureds were undertaken by ACE
24 employees, and I believe Ms. Flagg testified to that
25 same thing in her deposition where she says, as I note

1 in my Report, that she undertook no activities with
2 regard to examining coverage issues whatsoever.

3 Q. Okay. So you said -- and I understand
4 what you said here is that in this case it -- it
5 didn't, that ESIS didn't do the investigation on behalf
6 of ACE.

7 A. Right.

8 Q. What I am asking you is would it be
9 inappropriate if ESIS had done the investigation into
10 coverage on behalf of ACE?

11 A. Well, it didn't have any duties or
12 responsibilities to ACE, its contract was completely
13 and solely with UniFirst, so that would -- if they had
14 done something like that, it would have been outside
15 the activities for which they were contracted with
16 UniFirst.

17 Q. And would that have been inappropriate
18 also?

19 A. I would have to take a look at the
20 individual activities or what the claim professional
21 had before them at the time in order to make that
22 determination.

23 Q. I mean, it doesn't seem terribly
24 complicated. If it -- you said that the -- I thought
25 you had said that the ACE -- or somebody acting on

1 ACE's behalf needed to do the investigation into
2 coverage, right?

3 A. Yes.

4 Q. And so if ESIS did the investigation and
5 not ACE, then that would be inappropriate, would it
6 not?

7 A. Again --

8 MR. PULLIAM: Object to the form.

9 THE WITNESS: -- again, Mark, I would
10 just have to say --

11 THE COURT REPORTER: Who said that, I am
12 sorry?

13 MR. PULLIAM: Andy Pulliam.

14 THE WITNESS: I would need to take a look
15 at exactly what was done, why it was done and what
16 those circumstances were, otherwise it would just
17 be speculation.

18 BY MR. BELL:

19 Q. Would it -- would it -- would it need to
20 be some -- you said you need to look at the
21 circumstances. Would it need to be some atypical or
22 exceptional circumstances to make that appropriate?

23 A. Again, it would cause -- I don't want to
24 box myself in, Mark, with regard to commenting on a
25 hypothetical on which I don't have any facts, so I

1 would just have to say that I would need to take a look
2 specifically at what those facts or circumstances were
3 if, in fact, that were done; but in my review of the
4 record here, it was not.

5 Q. Now here ESIS really played two different
6 roles, did it not?

7 A. Well, I think the role that they played
8 was to act as a third-party administrator for UniFirst
9 under its Risk Management Services Agreement.

10 Q. Did it play any other role?

11 A. In terms of what?

12 Q. Was ESIS not also the TPA for the
13 conflict files?

14 A. A conflict file would be established in
15 the event there was an acceptance by ACE of an
16 additional insured tender for purposes of defending
17 that particular claim. There was a conflict file also
18 set up by ACE as well as by ESIS.

19 Q. And here there were conflict files that
20 were set up, right?

21 A. Yes.

22 Q. Okay. So in those situations then ESIS
23 is really playing two different roles, is it not?

24 A. No, it is merely monitoring the
25 activities that ACE is undertaking with regard to

1 having accepted the additional insured tender and
2 offering the defense under a reservation of rights.

3 Q. So what is the role of ESIS with respect
4 to a conflict file?

5 A. To make sure that the adjustor that is
6 undertaking the liability investigation for UniFirst is
7 not subjected to any of the activities that are taking
8 place involving the coverage evaluation or the defense
9 that is provided under reservation of rights to Tractor
10 Supply by ACE.

11 Q. Sir, walk -- walk me through that again.
12 Sorry, I don't think I caught that all. Sorry, do you
13 mind explaining that to me, again, Mr. Heinze?

14 A. Sure.

15 Kelly, could you read back the question,
16 please. I'll tell you what, why don't you read back
17 the question, if you would, and the answer.

18 And maybe, Mark, let's both listen to it
19 again and see if that makes sense.

20 MR. BELL: Sure.

21 (Whereupon the record was read
22 back as requested.)

23 THE WITNESS: Right. Does that make
24 sense, Mark?

25
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1 BY MR. BELL:

2 Q. Not -- not really. Let me try to break
3 it out some.

4 So you said -- I thought you were saying
5 -- or I thought in reading it back -- or hearing it
6 back, you said to make sure the adjustor involved in
7 the liability is not subject to a coverage evaluation
8 or defense; is that --

9 A. Is not being subjected to seeing any of
10 the coverage activities or the undertaking of a defense
11 for Tractor Supply by ACE under a reservation of
12 rights. You want to make sure that those lines of
13 demarcation are kept separate and independent so that
14 there is no crossover and so that, as Mr. Fey rightly
15 said, that firewall is maintained.

16 Q. I gotcha.

17 So what -- so is it -- so when ESIS is
18 handling -- when handling a claim -- a conflict file
19 claim, are they doing that on behalf of ACE, or who are
20 they doing that on behalf of?

21 A. They are doing it on -- through the
22 auspices of the Risk Management Services Agreement with
23 UniFirst.

24 Q. Okay. It is -- so -- so even when it
25 is -- when -- when ESIS's role with respect to the

1 additional insured is still within the auspices of
2 ESIS's contract with the TP -- with UniFirst?

3 A. Yes. Because the deductible for the
4 first four years of the program was \$500,000 per
5 occurrence and in the last year was a million dollars
6 per occurrence, so all of the activities were taking
7 place within that deductible layer, and that's what
8 ESIS was under contract with UniFirst, to assist as a
9 third-party administrator.

10 Q. Okay. So ESIS's role -- let me -- let me
11 ask it this way.

12 ESIS's role in that TPA side, even in a
13 conflict file, is just as it relates to liability; is
14 that right?

15 A. It is as it relates to liability for
16 UniFirst, that is correct. And it is monitoring the
17 activities that ACE is undertaking in providing the
18 defense under a reservation of rights to Tractor
19 Supply.

20 Q. So, for instance, like settlement
21 authority in a conflict file, who -- who would give
22 settlement authority?

23 A. In a conflict file where there was an
24 additional insured tender that was accepted under a
25 reservation of rights, that settlement authority would

1 come from ACE.

2 Q. And what would ESIS's role -- or what
3 should ESIS's role be with respect to settlement
4 authority?

5 A. The settlement authority that ESIS had
6 was, I believe, if my memory serves me correctly, Mark,
7 \$10,000 on behalf of UniFirst; and where matters were
8 up to and including \$10,000, it had the authority to
9 settle those claims on behalf of UniFirst.

10 Q. I -- I got that with respect to the
11 UniFirst but what about as it relates to a conflict
12 file for the additional insured?

13 A. It had no settlement authority on behalf
14 of ACE.

15 Q. Gotcha. Okay, so --

16 A. Because its authority -- sorry to
17 interrupt. Its authority was primarily and solely
18 through the contract of the Risk Management Services
19 Agreement. It had no similar agreement or any other
20 type of contractual relationship in regard to these
21 issues in this matter with ACE.

22 Q. So it had -- did I hear you right that --
23 that ESIS had no settlement authority with respect to
24 ACE?

25 A. With regard -- with regard to the matters

1 involving the UniFirst mats, correct, that's my
2 understanding.

3 Q. And then who -- so who was charged with
4 doing the investigation of coverage?

5 A. As I testified, that would be with regard
6 to the folks at ACE.

7 Q. ACE, okay.

8 Did you see any evidence of any employees
9 from ACE contacting anyone from Tractor Supply about
10 any individual accidents?

11 A. I don't recall as I am sitting here at
12 the moment. In all likelihood it probably would have
13 gone through Gallagher Bassett which was Tractor
14 Supply's third-party administrator if it happened, but
15 I just don't recall as I am sitting here at the moment.

16 Q. Do you remember -- did you see the
17 testimony of -- the deposition testimony of ESIS's
18 corporate representative?

19 A. Mr. Christman [sic]?

20 Q. Yes.

21 A. Yes. Or Christensen, I think it was.

22 Q. I think that is right.

23 A. Yeah.

24 Q. I think I said his name wrong 20 times
25 during the deposition.

1 But the -- do you remember a discussion
2 in his deposition about a matter being open for defense
3 only?

4 A. I do recall that, yes.

5 Q. And I think he had testified, and correct
6 me if I am wrong, that all of the -- all of the matters
7 for Tractor Supply's additional insured were opened for
8 defense only; is that right?

9 A. I would have to go back and look at the
10 exact testimony, Mark, I don't recall exactly what
11 Mr. Christensen's testimony was verbatim, but I would
12 allow that testimony to stand as it is. I did
13 certainly see that.

14 Q. Okay. And I guess the idea of if it was
15 defense only that would be consistent with your
16 understanding that ACE didn't actually -- I am sorry,
17 ESIS didn't have settlement authority on behalf of ACE,
18 right?

19 A. Correct.

20 Q. Let me ask you this. You -- the MedPay,
21 you are familiar with MedPay?

22 A. Yes.

23 Q. Why was -- why did ESIS not offer MedPay
24 to any of the claimants?

25 A. I am not interpreting the policy here,

1 Mark, but my understanding in looking at the 2016
2 through 2020 policies of ACE that were afforded to
3 UniFirst, was that on product liability claims there
4 was no MedPay coverage.

5 Q. What -- what leads you to that
6 conclusion?

7 A. I believe that was a provision within the
8 policy.

9 Q. That the policy said there was no MedPay?

10 A. On product liability claims.

11 Q. Any -- anything else that you can recall
12 as to why there wouldn't have been MedPay?

13 Excuse me.

14 A. Well, the policy speaks for itself so if
15 there is not going to be MedPay coverage on product
16 liability matters, that pretty much is what the policy
17 says. There may be other provisions and the policy was
18 quite long but I do recall that particular aspect of
19 the policy.

20 Q. And then -- because I -- did you see
21 e-mails or correspondence in the files where ESIS told
22 claimants that there was no MedPay on the ACE policies?

23 A. I believe so. I would have to go back
24 and take a look.

25 Q. And you agree with me that there was --

1 there was MedPay available under the policies, although
2 perhaps in certain circumstances -- let me break up the
3 question.

4 You would agree with me that subject to
5 the limitations of the policy there was MedPay on the
6 policies, right?

7 A. Yes.

8 Q. Okay. And so in a particular instance
9 MedPay may or may not have applied, right?

10 A. Again, I am not making any coverage
11 determinations, Mark, I was not asked to do any
12 coverage evaluations. I took the coverage as I found
13 it and rendered my opinions accordingly.

14 Q. And I am not going to argue with you
15 about whether there was or was not MedPay just because
16 I know you are not -- you weren't asked to testify --
17 you weren't asked to testify about whether the policy
18 did or didn't provide MedPay, right?

19 A. Correct.

20 Q. Okay.

21 A. Not at this time, at least.

22 Q. Gotcha.

23 Let's -- let's look at your Report, if
24 you can bring that up, Exhibit 425. And I am going to
25 reference page numbers on your Report.

1 A. Okay.

2 Q. Those are the -- those are going to be
3 the page numbers on the -- on the bottom corner of the
4 Report rather than the -- than the .pdf number.

5 A. Understood.

6 Q. So if we go to page 20 of your Report,
7 there is footnote 14 --

8 A. Yes.

9 Q. Is this -- this is the -- we had talked
10 about this earlier. Is this the explanation as to why
11 you did not give an interpretation on the -- on the
12 policy interpretation or the -- sort of the common law
13 duties?

14 A. And the statutes, because that is really
15 something that's outside the purview of expert witness
16 testimony. But as I said, Mark, I have reserved my
17 right to do so if it would be of assistance to the
18 Court, and if Mr. Fey is permitted to testify on it, I
19 would be respectfully requesting to do so as well. But
20 as I took everything in, certainly in what I do as a
21 claims professional and as I have done throughout my
22 entire career, customs and practices in the insurance
23 industry are certainly informed by common law and
24 statutes, so I certainly took those into consideration
25 when I examined the allegations in Tractor Supply's

1 Third Amended Complaint and issued my opinions
2 accordingly.

3 Q. Got it.

4 And if you would go with me on the Report
5 to page 32, the -- the first paragraph there; are
6 you -- are you there?

7 A. I am.

8 Q. Okay. It says: What's more, ESIS
9 adhered to these processes even when the underlying
10 facts clearly showed that an incident did not quote,
11 unquote, result from a UniFirst mat.

12 Do you see that?

13 A. I do.

14 Q. What did -- what do you mean that the --
15 that the facts clearly showed the incident did not
16 result from a UniFirst mat?

17 A. Right. So in the 60 claims that were
18 tendered, Mark, and it would help if I go back to page
19 31 to put this in context.

20 Q. Sure.

21 A. There is a discussion with regard to what
22 was done and how the facts were developed in ESIS's
23 determination of its liability investigation on behalf
24 of UniFirst. And in the course of that investigation,
25 if I remember the various facts of some of the claims,

1 there were situations in which someone may have tripped
2 over a cane or someone in a walking boot may have
3 stumbled on a mat where it really wasn't the mat's role
4 or responsibility of having caused the accident, it was
5 merely incidental to where the accident occurred.

6 Q. I gotcha. So you -- when you say that
7 the underlying facts clearly show the incident did not
8 result from a UniFirst mat, are you referring to all 60
9 claims or just a certain subset within the 60 claims?

10 A. I am referring to those matters that were
11 tendered by Tractor Supply for coverage and ESIS's
12 investigation with regard to whether the mats were or
13 were not at fault from -- for the accident or the
14 injuries that were sustained by that particular
15 claimant.

16 Q. Did you find in reviewing the files in
17 any of the 60 underlying claim files that the accidents
18 resulted from the mat?

19 A. I think that would be involving those
20 potentially eight matters in which ACE agreed to defend
21 under a reservation of rights where there may have been
22 an indication that the mats may have been involved in
23 precipitating or resulting in the claimant's injuries.

24 Q. Gotcha.

25 Now you -- you put the words "result

1 from" in quotes, right?

2 A. Yes.

3 Q. What does "result from" mean, in general
4 insurance parlance?

5 A. That that's what caused the accident.

6 Q. So would it be your position that
7 "results from" and "caused by" mean the same thing?

8 A. That would -- that would require a legal
9 interpretation, I think. I -- I am going to stick by
10 what I said in my Report. I would -- in normal
11 insurance parlance, what I am referring to here is that
12 the mats were involved in precipitating the accident as
13 opposed to merely being incidental to where the
14 accident occurred.

15 Q. I gotcha.

16 So "results from," that's -- another way
17 to say results from would be "involved in precipitating
18 the incident"?

19 A. I would agree with that, yes.

20 Q. Okay. And is that a generally accepted
21 -- and that definition, is that just sort of a
22 generally accepted insurance term for "results from"?

23 A. It is the one that I use.

24 Q. Gotcha, okay. Gotcha.

25 All right. And so would you agree with

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1 me that -- or let me ask you this. Yeah. Would you
2 agree with me "arising from," "results from," and
3 "caused by," those three terms are all used in
4 insurance policies, right?

5 A. They are.

6 Q. Would you agree with me that they all
7 mean something slightly different from one another?

8 A. They can.

9 Q. Can, okay.

10 And so they can but do they, I guess?

11 A. Well, again, that would require a look at
12 the entire context of the paragraph or the sentence,
13 Mark. It -- all I can say is they can mean different
14 things but I would have to see it in the particular
15 parlance of that, and, again, I am not making any kind
16 of coverage interpretations at this point.

17 Q. Gotcha.

18 A. All I am saying here is what those eight
19 litigation matters that were tendered and accepted by
20 ACE under a reservation of rights was based upon the
21 fact that the liability investigation conducted by ESIS
22 on behalf of UniFirst indicated that the mats may have
23 been responsible or that the damages may have resulted
24 from the mats. And that's why ACE, I think, decided to
25 afford a defense under a reservation of rights under

1 those circumstances.

2 Q. Gotcha, okay.

3 You -- you mentioned there the
4 investigation on behalf of -- I am sorry -- the
5 investigation by ESIS, the liability investigation by
6 ESIS, right?

7 A. Yes.

8 Q. Okay. And let me ask you this. Are
9 the -- the -- the investigation by ESIS, if we have got
10 a situation where there is a conflict file, so we have
11 got two -- got two ESIS adjustors, right?

12 A. I am following you.

13 Q. Okay, sorry. So we have got two ESIS
14 adjustors for a conflict file, who does the
15 investigation into liability?

16 A. One of those ESIS adjustors.

17 Q. It only has to be one of them?

18 A. Well, the other one would not have been
19 involved yet because the tender investigation had to be
20 provided so that ACE could make a determination as to
21 whether or not to afford coverage under a reservation
22 of rights; that's, then, when the conflict adjustor was
23 assigned both at ESIS as well as at ACE.

24 Q. So does the conflict adjustor do any
25 investigation into liability?

1 A. They can. It is certainly not anything
2 that I have seen that would be unusual but in all -- in
3 most situations they do not, they confine themselves to
4 undertaking only those activities involving the defense
5 now of the additional insured under the reservation of
6 rights.

7 Q. Now let me -- let me -- let me make sure
8 I am clear on something. You said that they undertake
9 only the actions in defense of the additional insured;
10 is that -- is that right?

11 A. The one conflict adjustor at ESIS and the
12 conflict adjustor at ACE --

13 Q. Gotcha.

14 A. -- whereas the liability investigation
15 was undertaken on behalf of UniFirst by the other ESIS
16 adjustor.

17 Q. Okay. So -- and typically the only
18 investigation that is done into liability is done by
19 the ESIS adjustor on behalf of UniFirst?

20 A. Yes. But I -- again, I am not saying
21 that exclusively that a conflict adjustor may not from
22 time to time also look at some other aspects as the
23 defense of the case is being conducted.

24 Q. Now the defense of the additional insured
25 in the conflict file, what -- what -- what role does

1 ESIS have in that?

2 A. It is acting in a role on behalf of
3 UniFirst of monitoring the activities and the
4 litigation that is now taking place and conducting its
5 activities in concert with the duties and
6 responsibilities that are outlined in the Risk
7 Management Services Agreement.

8 Q. Okay. So -- so even on a conflict file,
9 ESIS is only monitoring on behalf of UniFirst; is that
10 right?

11 A. Yes.

12 Q. So they are not monitoring on behalf of
13 ACE, right?

14 A. Correct.

15 Q. What interactions between ESIS and ACE
16 should take place with respect to a conflict file?

17 A. I am not sure I understand the question.

18 Q. Yeah, sure. So you have got a -- you
19 have got a -- so on the main file, the UniFirst file,
20 you will have -- I am sure you saw there is some
21 communications about liability and history and
22 everything else, right?

23 A. Right.

24 Q. And so that's -- those are communications
25 that are taking place between ESIS -- I don't want to

1 -- I put my hands like this because it is a battle, but
2 they are between ESIS and they are between ACE?

3 A. Well, it is not a battle.

4 Q. Right, I said it is not a battle; when I
5 put my hands like this, I said I don't mean it is a
6 battle, I meant they are communicating with each other.

7 A. Well, the communications that are taking
8 place are between ESIS and UniFirst.

9 Q. And also ESIS is communicating with ACE,
10 are they not?

11 A. The liability adjustor is communicating
12 with UniFirst, the conflict adjustor may be
13 communicating with ACE. Again, to keep those aspects
14 separate with regard to coverage and the reservation of
15 rights.

16 Q. I got -- I am with you. I mean on the --
17 on the non-conflict file, the UniFirst file, the ESIS
18 employee is communicating with ACE about liability and
19 other matters, right?

20 A. They can. They certainly share the
21 information if it is being requested but in those kind
22 of situations, from what I have seen, most of those
23 matters of the 60, most of them were probably amicably
24 resolved within the authority that ESIS had. There
25 were about 50 of them that were also put into

1 litigation that were not pursued. And 19 of those, I
2 think if my memory serves me correctly, were closed
3 without payment, and the rest of them were closed or
4 settled within the authority that ESIS had under its
5 authority from UniFirst under the high deductible
6 program.

7 Q. Right, but ESIS and ACE are communicating
8 about the liability, I mean, that's where ESIS -- ACE
9 is getting the information about how long the mat was
10 in its care, custody -- in Tractor Supply's care,
11 custody and control, is it not?

12 A. They can see that if it is certainly
13 requested but, again, ACE is being placed on notice of
14 matters in which there is a tender of an additional
15 insured endorsement. In most of these situations where
16 the investigation on liability is conducted, it is
17 communications between the ESIS adjustor and UniFirst.

18 Q. Sure. But the ones -- I am talking about
19 the ones where there was a tender to ACE for an
20 additional insured status.

21 A. Okay, that's different. That -- then in
22 that situation there may very well be a review by ACE
23 of the investigation that was conducted by the ESIS
24 adjustor.

25 Q. Okay. And so in those situations, the

1 same ones where you have got a tender that's been -- an
2 additional insured tender to ACE and you have got a
3 conflict file, what -- what interactions do the ESIS
4 conflict rep have with the ACE adjustor?

5 A. I think it is basically just monitoring
6 what is taking place in the litigation but it has
7 nothing to do with any of the coverage issues that ACE
8 has made with regard to whether or to what extent
9 coverage will be afforded under a reservation of rights
10 for the additional insured tender that was made by
11 Tractor Supply.

12 Q. Okay. So -- so you mentioned monitoring.
13 What -- what other roles other than monitoring does the
14 conflict -- ESIS conflict adjustor have with respect to
15 a conflict file?

16 A. Well, I think it is probably just based
17 upon what is taking place in the litigation and to make
18 sure that there is no information pertaining to the
19 coverage issues or the matters that are involved solely
20 for ACE's review that are being examined by the
21 liability adjustor for ESIS on behalf of UniFirst.

22 Q. Anything else that that conflict adjustor
23 is supposed to be doing?

24 A. There may have been other things. If
25 there is something that you would like me to take a

1 look at, I would be happy to see it, but that is what
2 my best recollection is in terms of what the ESIS
3 conflict adjustor was doing.

4 Q. Got it, okay.

5 And you said that their -- I thought that
6 you said that their role was also to make sure no
7 information pertaining -- pertaining to coverage was --
8 was issued; is that right?

9 A. Yes.

10 Q. And so ESIS -- for the conflict file,
11 ESIS has no role whatsoever with respect to coverage;
12 is that right?

13 A. That's correct, all of the coverage
14 decisions were made by ACE.

15 Q. What about with respect to an
16 investigation? Did -- did ESIS perform investigations
17 on ACE's behalf for conflict files?

18 A. No.

19 Q. Would that be improper if ESIS had?

20 A. It would have to have been done under
21 various circumstances. I have to take a look at what
22 those circumstances were or what the requests were, but
23 the bottom line here from what I have reviewed in the
24 record was that ESIS limited its activities to those
25 instructions, the special -- the general liability

1 service instructions as well as the duties and
2 responsibilities it had under the Risk Management
3 Services Agreement with UniFirst and that alone. All
4 of the aspects with regard to investigations of
5 coverage were undertaken by ACE in -- in their role as
6 the underwriter for this program.

7 Q. If you would, scroll up with me. I think
8 you were looking at page 31 last.

9 A. And 32, right.

10 Q. Yes. If you could scroll up a little
11 higher on 31, and in fact the bottom of page 30.

12 A. Okay.

13 Q. Do you see the -- the last sentence
14 there, "if ACE American accepted coverage" --

15 THE COURT REPORTER: I am sorry, last
16 sentence there, what is it?

17 BY MR. BELL:

18 Q. "If ACE American accepted coverage"; do
19 you see where I am at?

20 A. Yes, I do.

21 Q. It says: ESIS then created a separate
22 claim file (the "conflict file") and assigned
23 the matter to a separate ESIS claim representative for
24 further handling of TSC's defense.

25 A. Right, within -- within the deductible,

1 that's right.

2 Q. Okay. And what I am trying to understand
3 is what -- what does that further handling TSC's
4 defense, what does that entail?

5 A. Basically monitoring the activities of
6 defense counsel and liaising with ACE to the extent any
7 of that liaising will be of assistance to UniFirst with
8 regard to the resolution of the claim.

9 Q. Gotcha.

10 The further handling of TSC's defense,
11 that is on behalf of UniFirst, right?

12 A. Well, under the indemnity provisions of
13 the contract -- of the contract between UniFirst and
14 Tractor Supply.

15 Q. Were you done?

16 A. Yes.

17 Q. Oh, okay, I am sorry. I didn't know if
18 you had finished your answer.

19 Okay. So -- so what do you mean with
20 respect to the indemnity obligations?

21 A. There is an indemnity -- a mutual
22 indemnity provision within the contract for the Textile
23 Services Agreement of flat goods between UniFirst and
24 Tractor Supply. And part of that would be UniFirst's
25 obligation to indemnify Tractor Supply in the event

1 there was a defect or negligence with regard to any of
2 its mats that were rented to Tractor Supply.

3 Q. I gotcha.

4 So let me ask you -- let me ask you this.
5 Is the -- when you say for further handling of TSC's
6 defense, are you talking about TSC's defense under the
7 indemnity obligation or TSC's defense under the
8 additional insured coverage?

9 A. Well, the additional --

10 MR. WARRINGTON: Form.

11 THE WITNESS: -- additional insured -- I
12 am not making any coverage determinations here or
13 interpreting the policy, but the way my
14 understanding worked -- is that the indemnity
15 provision of the Textiles Services Agreement of
16 flat goods required insurance provisions by
17 UniFirst in order to indemnify Tractor Supply for
18 various willful or other negligent activities of
19 UniFirst. And in those circumstances where an --
20 an ESIS adjustor had conducted a liability
21 investigation on behalf of UniFirst and found that
22 there may have been a defect in a mat that had
23 been rented to Tractor Supply and an additional
24 insured tender by Tractor Supply to ACE, that's --
25 on those occasions is where the defense would then

1 be provided under a reservation of rights.

2 BY MR. BELL:

3 Q. Gotcha.

4 If you could turn with me to page 38 of
5 your report.

6 A. Okay.

7 Q. I am talking to you about this bullet
8 point in -- in the middle and then the first sub bullet
9 point, "as noted above"; do you see that?

10 A. Yes, I do.

11 Q. It says: As noted above, there was no
12 "arrangement" between ESIS and ACE American, and the
13 record does not indicate there being one.

14 Do you see that?

15 A. I do.

16 Q. And what I am trying to understand, when
17 you say "there was no arrangement," what do you -- what
18 do you mean that there wasn't any arrangement?

19 A. Right. So what I -- what I am talking
20 about here in this section of the Report are my
21 responses to Mr. Fey's opinions. And one of the things
22 that he commented on -- Mark, if you just go to the
23 bullet point above the sub bullet that you just
24 mentioned.

25 Q. Sure.

1 A. It provides Mr. Fey's comment that there
2 was an arrangement between UniFirst, ESIS and ACE on
3 the large deductible program and there just wasn't.
4 There was no arrangement between UniFirst, ESIS and
5 ACE. There was a contractual relationship between ACE
6 and its policyholder, UniFirst. There was a separate
7 and independent relationship between UniFirst and ESIS
8 to act as its TPA to conduct investigations and other
9 activities in concert with those provisions of the Risk
10 Management Services Agreement in regard to those claims
11 from patrons that were going in and out of Tractor
12 Supply stores.

13 So I think what Mr. Fey was confused
14 about was I think he believed that there may have been
15 some kind of arrangement between UniFirst, ESIS and
16 ACE, and my comment on the sub bullet is, there simply
17 wasn't; there is no indication in the record that there
18 was; there is no indication in any of the deposition
19 testimony, other than from Mr. Fey, that there was; and
20 that, quite frankly, the RMS Agreement and the General
21 Liability Services Instructions were the only
22 contractual relationships that ESIS had with UniFirst.
23 It had none of those similar type duties or
24 responsibilities or arrangements with ACE, contrary to
25 Mr. Fey's perception.

1 Q. I gotcha.

2 And so I guess maybe some of the
3 confusion lies -- and this is maybe my own confusion,
4 but ESIS -- or ACE -- ESIS is an affiliated company of
5 ACE American, right?

6 A. That's my understanding.

7 Q. Okay. And so I think part of the
8 confusion, potentially my confusion, is around ESIS
9 because ACE -- my understanding at least is that ACE
10 will sometimes hire ESIS to handle claims as a TPA on
11 ACE's behalf; is that -- is that your understanding?

12 A. Yes.

13 Q. Okay. And so let's say, for instance,
14 that UniFirst had hired Gallagher Bassett, just so
15 that we -- just so that we don't have any confusion
16 about the parties.

17 A. Okay.

18 Q. Are you with me?

19 A. I am.

20 Q. So in that situation, Gallagher Bassett
21 in this hypothetical is UniFirst's TPA; are you with
22 me?

23 A. Yes.

24 Q. And so if -- and let's say they have the
25 same agreement between Gallagher Bassett as UniFirst --

1 as exists between ESIS and UniFirst; are you with me?

2 A. Yes.

3 Q. In that situation if a conflict file
4 needed -- needed to be opened, who would handle that
5 conflict file; would it be Gallagher Bassett that
6 handled the conflict file or would it be ESIS handling
7 the conflict file?

8 MR. PULLIAM: Object to the form.

9 MR. WARRINGTON: Same.

10 THE COURT REPORTER: Wait, was that Mr.
11 Pulliam?

12 MR. BELL: I think it was everyone.

13 MS. CHRISTOPHER: We all object.

14 MR. PULLIAM: Yes.

15 THE WITNESS: It -- it -- it is a little
16 bit of an unwieldy question mark but let me see if
17 I can break it down and see if -- if we can
18 establish some agreement on an answer here.

19 If Gallagher Bassett was in the role of
20 ESIS and had been contracted by UniFirst, right --

21 BY MR. BELL:

22 Q. Uh-huh.

23 A. -- that was your question?

24 Q. Yes.

25 A. There would have to be a separate

1 adjustor already assigned and a separate firewall
2 established, because Gallagher Bassett is also
3 operating as a TPA of Tractor Supply Corporation.
4 There is nothing wrong with a TPA handling a
5 circumstance of two entities that find themselves
6 involved in a contractual relationship and were under
7 indemnity provision or an insurance provision, what
8 have you, that one is tendering a defense request to
9 the other. But in those circumstances there has to be
10 a firewall between the claim professionals at Gallagher
11 Bassett. And in that situation, yes, a conflict file
12 would also have to have been set up at Gallagher
13 Bassett, just as it was at ESIS, just as it was at ACE,
14 in order to handle that particular claim.

15 Q. Yeah, and you -- Mr. Heinze, you can call
16 it -- one of the many inelegancies of the example I
17 used in that using Gallagher Bassett you have a sort of
18 different conflict that I wasn't trying to ask about
19 but you answered that more precisely than I had asked
20 it.

21 Let me use a different example. Instead
22 of Gallagher Bassett, let's say that the same
23 hypothetical except UniFirst now has Sedgwick --

24 A. Okay.

25 Q. -- a separate independent TPA.

1 A. Okay.

2 Q. And in the situation -- so we have the
3 same hypothetical, Sedgwick is UniFirst's TPA, they
4 have the same agreement between UniFirst and Sedgwick
5 as exists between Sedgwick and ESIS?

6 A. And who is the carrier?

7 Q. The carrier is ACE.

8 A. Okay.

9 Q. So same carrier ACE. In that situation a
10 claim file -- a claim gets tendered to ACE and ACE --
11 and a conflict file is set up. Is the conflict file
12 managed by Sedgwick in this situation or is it managed
13 by ESIS or some other TPA?

14 A. It would be handled under ordinary
15 customs and practices in the same manner as it was
16 here, Mark. There would be a conflict file that would
17 be set up by the TPA as well as by ACE in order to make
18 sure that that claim was handled appropriately --

19 Q. Gotcha.

20 A. -- and reasonably.

21 Q. And just so I am clear, though, you said
22 there would be a conflict file set up by the TPA. Is
23 that the TPA Sedgwick in this -- in this hypothetical?

24 A. Yes, just as it was by ACE in real -- in
25 the real life.

1 Q. I gotcha, okay.

2 So -- so the fact -- so my understanding
3 of your position is that the fact that ESIS and ACE
4 might have had some other independent relationship,
5 where ESIS handled some claims on behalf of ACE, had
6 nothing to do -- had no role whatsoever in a conflict
7 file from ESIS being assigned to these claims; is that
8 right?

9 A. I understand --

10 MR. WARRINGTON: Object to form.

11 Excuse me.

12 THE WITNESS: That's quite all right, Al.

13 Mark, I absolutely understand your
14 question and I understand where you are coming
15 from. Let me see if I can explain it to you based
16 upon how TPAs work with insurance carriers. You
17 are right, there was, based upon my understanding,
18 an affiliation between ESIS and ACE but that has
19 absolutely nothing to do with the facts and
20 circumstances of Plaintiff's Third Amended
21 Complaint here or any of ESIS's activities with
22 regard to its duties and responsibilities to its
23 principal, and its only principal, which was
24 UniFirst. It undertook those responsibilities in
25 accordance with ordinary customs and practices of

1 third-parties administrators that are under
2 contract pursuant to a risk management services
3 agreement. I have written those agreements, I
4 have seen them, I have implemented them, I have
5 audited them, it is the same ones like the ones
6 that we have. And in those circumstances the
7 ownership or the affiliation or the stock,
8 whatever it may be, that ACE has with ESIS is
9 totally separate and independent. And there is
10 nothing, nothing that I have seen in this record
11 where ESIS was not honorable to its
12 responsibilities solely to UniFirst, and without
13 any kind of feeling that it owed anything to ACE
14 because it didn't, either contractually or in any
15 other way.

16 BY MR. BELL:

17 Q. Got it.

18 And let me -- let me ask you this way.
19 In the last paragraph there in that -- in that same
20 paragraph, it says: ESIS had no independent obligation
21 to ACE American. Likewise, ESIS had no obligation to
22 TSC.

23 Do you see that?

24 A. Yes.

25 Q. And are you saying -- does this statement

1 hold true even with respect to the conflict files?

2 A. Yes.

3 Q. So even in the conflict files ESIS had no
4 obligation to TSC?

5 A. Its obligation was to UniFirst.

6 Q. And it had no obligation to TSC?

7 A. No. The obligation to TSC was the
8 defense that ACE provided under a reservation of
9 rights. TSC had its own independent third-party
10 administrator that was also looking at liability
11 investigations and other activities on TSC's behalf.

12 Q. Now did -- did you see in the e-mails
13 there are a number of e-mails from ESIS where it says:
14 Esis Inc. is handling this -- this on behalf of Ace
15 American Insurance Company.

16 Did you see those e-mails?

17 A. Could you show me one?

18 Q. Sure. Let me do this. This -- I know --
19 I know these documents have been marked previously but
20 I just don't -- I don't have them offhand, so we are
21 going to go ahead and mark them again. At the next
22 break I will get them uploaded but I am just going to
23 show three of them here and I will give you all the
24 numbers. And I am just going to share my screen if
25 that works for you.

1 A. Yeah, sure.

2 Q. I don't have them uploaded.

3 A. Okay.

4 Q. Share screen --

5 Do you see -- do you see my screen,

6 Mr. Heinze?

7 A. I do.

8 Q. Okay. This is -- on the bottom it says:

9 ESIS 007043.

10 Do you see that?

11 A. I don't see the bottom of it, Mr. Bell,

12 but I see everything else.

13 Q. Do you see it now?

14 A. No.

15 It's all right.

16 Q. I will mark it for reference as ESIS

17 7043, but do you see it is Marcia Flagg to Keith

18 Barnes?

19 A. Yes.

20 Q. And this will be Exhibit 426 and it is

21 ESIS 7043.

22 (Exhibit 426 - November 17, 2020 E-Mail.)

23 THE WITNESS: Oh, there it is, okay; now

24 I see it at the bottom.

25

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1 BY MR. BELL:

2 Q. And then see here it says: Sincerely,
3 Esis Inc.

4 And it says: Esis Inc. is handling this
5 on behalf of Ace American Insurance Company.

6 Do you see that?

7 A. I do.

8 Q. And this is for claimant Vicki Parsons?

9 A. Yes, it is.

10 Q. Now when -- when you said they didn't
11 have any relationship with ACE, how do you explain this
12 language here, ESIS is handling this on behalf of ACE
13 American Insurance Company?

14 A. In some states, Mark, there is a
15 requirement that a third-party administrator place
16 somewhere on its correspondence to the outside world
17 who the statutory underwriting entity is, and that is
18 what I believe this reference is to as well as in the
19 other e-mails in which that reference appears. In my
20 understanding there was an opportunity of the ESIS
21 claim professionals to have a drop-down menu of their
22 signature line. And I have the same thing in my
23 company where if you are operating on behalf of someone
24 and you are operating in a state which has those
25 requirements, you can click on the drop-down menu to

1 provide information transparently to the recipient of
2 the communication that the statutory underwriting
3 company is ACE American Insurance Company.

4 It is not correct that ESIS was handling
5 the matter on behalf of ACE American Insurance Company,
6 it is just what that signature line says as was
7 statutorily, I think, required in some of the states.
8 But from everything else in the record and from all of
9 the testimony in the record, there was no indication
10 that ESIS ever did any handling of this claim or any
11 others on behalf of ACE American Insurance Company.
12 All of its duties and responsibilities flowed solely
13 and exclusively out of the Risk Management Services
14 Agreement and the General Liability Services
15 Instructions with UniFirst.

16 Q. All right. Mr. Heinze, we have been
17 going for an hour and a half, I think now may be a good
18 place to take a break. Do you want to take -- what do
19 you want to take, five minutes, ten minutes?

20 A. I will tell you what, can we go off the
21 record and we will have the discussion.

22 Q. Sure.

23 THE VIDEOGRAPHER: We are going off the
24 record, the time is 10:28 a.m.

25 (Whereupon a break was held.)

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1 THE VIDEOGRAPHER: We are returning to
2 the record, the time is 10:42 a.m.

3 BY MR. BELL:

4 Q. Hi, Mr. Heinze.

5 A. Hi, Mr. Bell.

6 Q. On page -- turn to page 39 of your
7 Report.

8 A. Okay.

9 Q. There is the second -- there -- the last
10 sentence in that first bullet point of your language.

11 MR. PULLIAM: Graham, we are on page 39
12 of his Report.

13 BY MR. BELL:

14 Q. Do you see that the last sentence of the
15 first bullet point from your -- from your statement?

16 A. Yes.

17 Q. "ESIS never assigned the same claims
18 handler to handle the claim against UniFirst and the
19 claim against TSC."

20 Do you see that?

21 A. Yes.

22 Q. How -- how do you know that to be the
23 case?

24 A. This refers to what I am saying in the
25 Report that -- where ACE American accepted Tractor

1 Supply's tender for a defense or coverage, that that
2 conflict was -- file was opened up. So this is exactly
3 that conflict situation, Mark, where a separate ESIS
4 adjustor was continuing to do the liability
5 investigation and the conflict adjustor was there, as I
6 said, to monitor what was taking place in the defense
7 of the claim and to pay the bills -- the defense
8 counsel bills under the deductible program. So those
9 are the -- what I am referring to there is the -- we
10 are not handling -- not using the same adjustor to
11 represent both entities in that type of a situation
12 where ACE has agreed under a reservation of rights to
13 accept the tender of defense and provide the tender.

14 Q. Understood. But how do you know that
15 they -- that they never assigned the same claims
16 handler to handle the claim against UniFirst and
17 the claim against TSC?

18 A. Because from what I looked at in the
19 record I did not see a -- the conflict adjustors at
20 ESIS being the same person.

21 Q. How did you know whether it was a
22 conflict -- whether the claim was being handled as a
23 conflict file or as the UniFirst file?

24 A. Because it would have been in the claim
25 files of those eight matters, I think it was Alissa

1 Garrett; Barbara Holderness; Hathaway; Hammond; Munn --
2 sorry, not Munn; Hammond; Atkinson; Brown; I don't
3 remember the others, that where the tender of defense
4 was accepted and the separate claim file was
5 established for the purpose of the conflict file.

6 Q. And did you look through all eight claims
7 from both the UniFirst claim handler and the ESIS -- or
8 I am sorry, the conflict file?

9 A. Yes.

10 Q. What format were those documents in that
11 you looked at?

12 A. In the Relativity Database.

13 Q. Did you look through any of the ACE claim
14 files?

15 A. If they were in the Relativity Database,
16 yes.

17 Q. Do you know what was in the Relativity
18 Database?

19 A. I think it is everything that has been
20 produced during the course of pretrial discovery.

21 Q. How long did that take you to go through
22 all of those?

23 A. I think -- I -- I have not totalled up
24 all the time yet but it is probably close to 120, 130
25 hours by now.

1 Q. Now did ESIS assign adjustors that had
2 handled UniFirst matters to conflict files?

3 A. I would have to go back and take a look,
4 I don't recall.

5 Q. Would -- would there be anything wrong
6 with that?

7 A. No.

8 Q. And, again, ESIS -- because I guess ESIS
9 had no duties to TSC anyway, right?

10 A. Right. All of TSC's third-party
11 administrative activities were undertaken by Gallagher
12 Bassett, and its -- they also had separate defense
13 counsel on their behalf looking out for their
14 interests.

15 Q. Who -- who opened a conflict file, ACE or
16 ESIS?

17 A. Most of the time both.

18 Q. So there were two separate conflict files
19 going on?

20 A. That's my understanding, yes.

21 Q. And then who -- who made the decision
22 that a conflict file was needed at ESIS?

23 A. When there was an acceptance by ACE of
24 the tender under a reservation of rights.

25 Q. And you would agree with me that ESIS was

1 copied on communications with UniFirst about coverage
2 decisions, right?

3 A. Yes.

4 Q. Did ESIS ever object to discussions
5 between UniFirst and ACE concerning coverage decisions?

6 A. What do you mean by "object," Mark?

7 Q. Did they ever say, hey, guys -- you know,
8 did they ever make any objection about, hey, this is,
9 you know -- we shouldn't be having these conversations
10 or otherwise?

11 A. No, I didn't see that.

12 Q. Should ESIS have objected to discussions
13 between UniFirst and ACE concerning coverage decisions?

14 MR. BELL: Form.

15 MR. WARRINGTON: Object to the form.

16 THE WITNESS: There were no
17 communications that I recall, Mark, where there
18 were discussions of coverage. ESIS was copied on
19 coverage determinations or drafts of coverage
20 letters that would be provided, but they were not
21 involved or engaged in making any of those
22 coverage determinations.

23 BY MR. BELL:

24 Q. I want to show you a document that has
25 previously been marked Exhibit 344; it should be in

1 your share file now if you open it.

2 THE COURT REPORTER: What file -- what
3 number is it?

4 MR. BELL: Exhibit 344.

5 THE COURT REPORTER: Thank you.

6 THE WITNESS: Okay, I have it.

7 BY MR. BELL:

8 Q. Do you see on this -- take as much time
9 as you need to read it. Let me know when you have had
10 a chance to review it.

11 A. Okay.

12 Okay, I have read it.

13 Q. Okay. So on the -- on the bottom of the
14 first page there is an e-mail from Francesca Rivelra; do
15 you see that?

16 A. I do.

17 Q. And it says: Please find attached
18 the denial letter for the above-referenced loss.
19 Please review and let me know if you would like me to
20 schedule a phone conference to discuss further with all
21 applicable parties for the coverage determination.

22 Do you see that?

23 A. I do.

24 Q. So how do you say that there was not
25 any -- that there was not any discussion with the --

1 with UniFirst and ESIS concerning coverage
2 determinations?

3 A. Well, all this tells me is that there is
4 a question as to whether a telephone call should be
5 scheduled, not that there was. And particularly I
6 don't recall in reviewing the entirety of this record,
7 Mark, where ESIS got involved in any kind of coverage
8 determinations other than to perhaps offer information
9 with regard to outstanding liability investigations
10 that were taking place before a coverage letter would
11 be issued but they did not get involved in interpreting
12 the policy or in suggesting what should be or not be
13 included in a reservation of rights letter or in a
14 denial letter.

15 Q. Did -- so you -- ESIS didn't get involved
16 in what should be in a reservation of rights letter or
17 a denial letter; is that right?

18 A. That's right.

19 Q. Was UniFirst involved in what should be
20 in a denial letter or a reservation of rights letter?

21 MR. PULLIAM: Object to the form.

22 THE WITNESS: I think this letter speaks
23 for itself in terms of what Ms. Rivero is
24 referring to but, again, this is more a comment
25 with regard to a liability situation as opposed to

1 interpreting whether a particular coverage grant
2 or insuring agreement or exclusion or endorsement
3 applies.

4 BY MR. BELL:

5 Q. But this -- this is also speaking to the
6 liability issue, is it not?

7 A. Yes.

8 MR. PULLIAM: Object to form.

9 THE WITNESS: I mean, the letter speaks
10 for itself but it basically has Ms. Rivela sending
11 a denial letter to the recipients and asking
12 whether there should be a telephone call.

13 BY MR. BELL:

14 Q. Right. And if we scroll up to the next
15 e-mail, it is an e-mail from Ms. Rivero to Ms. Rivela,
16 right?

17 A. Right.

18 Q. And Ms. Rivero is at UniFirst?

19 A. Right.

20 Q. And she says: Under "The Claim": We
21 cannot say that "It is our understanding UniFirst
22 delivered the mat in question...". I would suggest
23 replacing this by saying something to the effect that
24 UniFirst had completed a delivery of mats to Tractor
25 Supply 9/04/18 prior to the alleged accident [sic]. If

1 the mat at issue is later determined to be a UniFirst
2 mat, it would have been in...

3 And then below it says: Again, we cannot
4 admit this involves our mat and as such would not want
5 to make any admission of facts that we would find
6 ourselves later having to defend because of this error.

7 Do you see all of that?

8 A. I do.

9 Q. And so this is -- you would agree with
10 me, this is related to UniFirst's liability; is that
11 right?

12 MR. PULLIAM: Object to the form.

13 THE WITNESS: Yes.

14 BY MR. BELL:

15 Q. And is it ESIS's job to determine the
16 liability of UniFirst?

17 A. ESIS is the collection of information
18 after which a review of a liability determination can
19 be made, so they are involved in the process of
20 collecting the facts, undertaking the investigation and
21 making a recommendation in their responsibilities under
22 the Services Agreement to UniFirst.

23 Q. The changes here, would you not agree
24 with me, that this has an impact on coverage for
25 Tractor Supply?

1 MR. PULLIAM: Object to the form.

2 MR. WARRINGTON: Join.

3 THE WITNESS: No. The letter --

4 the e-mail and the letter and the wording that is
5 used speak for themselves, but the way I reviewed
6 it when I read it was that this was information
7 that Ms. Rivero was communicating to Ms. Rivela in
8 terms of what should be included in the letter as
9 respects any potential liability of UniFirst based
10 upon the demands that were made and the
11 information that had been collected.

12 BY MR. BELL:

13 Q. So you don't think that this letter has
14 an impact on coverage?

15 MR. PULLIAM: Object to the form.

16 THE WITNESS: I don't believe this letter
17 has an impact on coverage standing in itself. The
18 coverage issues and the facts pertaining to
19 liability are two separate things. The facts
20 pertaining to liability had been -- had
21 collected -- collected by ESIS and provided to
22 UniFirst. Once the tender was received, ACE then
23 took that information, reviewed it, and wanted to
24 have a letter denying coverage set forth, but this
25 particular language here relates to a potential

1 liability and not with regard to coverage.

2 Coverage is separate and distinct from liability.

3 BY MR. BELL:

4 Q. All right. The next document I want to
5 show you is Exhibit -- it has been previously marked
6 Exhibit 343, you should have it in your folder.

7 A. I do.

8 Q. Do you see it okay?

9 A. Yes.

10 Q. Okay. Just let me know after you have
11 had a chance to review it.

12 A. Okay.

13 Q. I am not going to ask you the details of
14 what Marcia Flagg said in all of her writings, so I am
15 not -- it is not a memory quiz on that, but I just want
16 you to be able to review it.

17 A. All right. So we are going to look at
18 the second page, then, as opposed to the first, right?

19 Q. We are going to look at both pages.

20 A. Okay. Where would you like me to start?

21 Q. Just on this -- this Marcia Flagg e-mail,
22 April 12th, 2018.

23 A. Okay.

24 Q. The subject: NEW carrier referral to
25 address tender, our client: Unifirst Corporation,

1 Claim --
2 -- claim number, date of loss, et cetera,
3 et cetera.

4 A. Right, the Patricia Padgett claim.

5 Q. Yeah. And then there is a description of
6 the accident, right?

7 A. Yes.

8 Q. There is a result of investigation
9 and liability assessment.

10 A. Correct.

11 Q. And then there is some additional notes
12 and details and descriptions of the incident.

13 A. Pertaining to the video that was
14 reviewed.

15 Q. Right.

16 A. Yes.

17 Q. Okay. And then the next e-mail is an
18 e-mail from Gregg Aronson to Marcia Flagg. And Marcia
19 Flagg is at ESIS, right?

20 A. Yes.

21 Q. Okay. And he says, "Chubb file is" --
22 that claim number. "I'll send you a proposed letter.
23 Contact me with any questions."

24 Do you see that?

25 A. I do.

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1 Q. And then it says -- the next e-mail is
2 Marcia and Margarita, "Please see attached proposed
3 response to the tender. Let me know your thoughts.
4 Thanks."

5 And then Ms. Rivero responds, "We agree
6 with the attached response to the tender, please
7 proceed as outlined. Can you please add Barbara
8 Christman to the distribution list?"

9 Do you see all of that?

10 A. I do.

11 Q. So in this situation we are -- was
12 there -- was ACE influenced by any investigation of the
13 incident conducted by ESIS?

14 MR. PULLIAM: Object to the form.

15 THE WITNESS: To whatever extent a
16 coverage determination was made by Mr. Aronson
17 with regard to information that he had received
18 pursuant to the liability investigation ESIS had
19 conducted for UniFirst would have to be a question
20 that would be asked to Mr. Aronson. I did not see
21 in my review of the record that any of the
22 liability investigation adversely or prospectively
23 caused ACE to make a determination as to what its
24 coverage grant provided coverage for or did not
25 provide coverage for to Tractor Supply; those were

1 separate decisions that were made.

2

3 BY MR. BELL:

4 Q. So do you think that -- that the -- did
5 the -- that investigation and report and description by
6 ESIS, did that have any bearing on ACE's determination
7 on liability?

8 A. It may have.

9 Q. Okay. And so if I can go back to your
10 Report to page -- back to page 39 on Exhibit 425; are
11 you with me?

12 A. Yes.

13 Q. Okay. On the second bullet point there
14 of what you have written, you said: There is no
15 indication in any of the claim files that the actions
16 and decisions by the claim professionals at ACE
17 American were influenced by any conduct, activity or
18 factual investigation of the incident conducted by
19 ESIS.

20 Do you see that?

21 A. I do.

22 Q. How do you square that statement with,
23 for instance, that e-mail that we just looked at?

24 A. Because what ACE is doing is responding
25 to a tender of defense and making a coverage

1 determination based upon the information they have
2 before them. The information that they have was
3 collected under the generally accepted customs and
4 practices of third-party administrators and claim
5 professionals in trying to determine through video
6 evidence, interviewing of witnesses, information
7 received from Gallagher Bassett and Tractor Supply with
8 regard to how this incident occurred; that information
9 is then provided and a coverage determination is then
10 made.

11 I did not see anything in the liability
12 investigation conducted by ESIS on behalf of UniFirst
13 that influenced or in any other way caused ACE to take
14 a particular coverage position. That was something
15 that ACE did on their own based upon the clear and
16 express language of the coverage grants, endorsements
17 and exclusions and definitions of their policy.

18 Q. Okay. So -- but the statement you said
19 here is that: There is no indication in any of the
20 claim files that the actions and decisions by the claim
21 professionals at ACE American were influenced by any
22 conduct, activity or factual investigation in the
23 incident conducted by ESIS.

24 Do you see that?

25 A. Correct. I do.

1 Q. How -- how do you -- what do you mean
2 that ESIS' factual investigations didn't impact any
3 decision made by ACE?

4 A. What I am saying is that they did not
5 influence the conduct, activity that ACE undertook with
6 regard to determining whether or not to accept the
7 tender under a reservation of rights pursuant to the
8 terms, conditions and exclusions of its policies.

9 Q. Okay. So -- so would you -- would you
10 qualify or clarify this paragraph to say that this as
11 it relates to coverage decisions?

12 A. Yes.

13 Q. Okay.

14 A. That's what I -- that's what I am
15 responding to here. That if you look at Mr. Fey's
16 initial bullet point at the top, it talks about ACE
17 denying Tractor Supply's additional insured status and
18 that those were based upon ESIS's claim investigation
19 and directly influenced by UniFirst as evidenced by the
20 communications. He doesn't cite to any but it is
21 something that is related back to the report that he
22 has provided. And as I looked at this, Mark, I did not
23 see any factual investigation that was conducted by the
24 ESIS claim professionals on behalf of UniFirst that
25 adversely or proactively influenced ACE to make a

1 coverage determination based upon their independent
2 evaluation of the information they had before them at
3 the time.

4 Q. You are talking about the independent
5 investigation; the information for that independent
6 investigation that ACE conducted, where did that
7 information come from?

8 A. Well, it came from a variety of sources.
9 It came from Gallagher Bassett, it came from Tractor
10 Supply and it came from ESIS.

11 Q. And do you see any communications about
12 individual claims and background from Tractor Supply to
13 ACE directly?

14 A. No, everything went through Gallagher
15 Bassett and ESIS. But when you asked me what
16 information they reviewed, that is a collection of
17 information that they took from the sources from which
18 it was received.

19 Q. Let me ask you this. In Relativity,
20 going through all of those documents, did you see
21 anywhere in -- in the documents any investigation into
22 liability conducted by an ACE representative?

23 A. I would have to go back and take a look,
24 Mark, I honestly don't recall.

25 Q. You don't recall any sitting here today,

1 right?

2 A. Right.

3 Q. But you do recall --

4 A. There are 60 claims that were tendered
5 and 50 -- over 50,000 documents that I reviewed. I
6 would have to go back and take a look to research your
7 question.

8 Q. But you -- you do recall seeing that
9 there was investigations into liability conducted by
10 ESIS for the files -- or for the claims?

11 A. That was conducted by ESIS as well as by
12 Gallagher Bassett on behalf of Tractor Supply, that's
13 correct.

14 Q. Sure, okay.

15 So if you don't recall any investigation
16 being conducted by ACE --

17 A. I didn't say that.

18 Q. Oh, what did you say?

19 A. I just -- I just said I don't recall
20 sitting here today whether there were any.

21 Q. Okay. So you don't recall sitting here
22 today whether there was any investigation by ACE into
23 the liability for each of these individual claims?

24 A. Whether there was or there wasn't, I just
25 don't recall sitting here at the moment. I would have

1 to go back through the record and take a look.

2 Q. Let me ask you this. Should ACE have
3 done its own investigation into the liability?

4 A. It depends upon whether the ACE adjustor
5 making a determination in response to the tender of
6 defense by Tractor Supply believed that additional
7 information was necessary or whether it had independent
8 information from the investigation that had been
9 collected on which to make that determination.

10 Q. And the information it would have -- the
11 independent information would have come from either, I
12 think you said, and correct me if I am wrong, Gallagher
13 Bassett or ESIS?

14 A. Or Tractor Supply.

15 Q. Or Tractor Supply.

16 A. Right. I mean, I did not see any
17 objection by Tractor Supply in regard to the underlying
18 facts and circumstances pertaining to the claims that
19 were asserted due to the mats in the record documents
20 that I reviewed.

21 Q. Would you agree with me that ACE then, at
22 least in some of the claims, relied on information
23 provided to it from ESIS?

24 A. I think ACE took into consideration --
25 and, again, this would have to be something that would

1 be asked of the ACE representatives, but from what I
2 reviewed I believe that the ACE claim professionals
3 certainly considered the information they had before
4 them at the time in making their coverage
5 determinations.

6 Q. And so, I guess, taking that as true, I
7 don't understand how you can say that -- that the
8 actions and decisions by ACE weren't influenced by
9 ESIS?

10 A. Because ACE is making its own coverage
11 determination separate and apart from the information
12 that is receiving -- that it is receiving based upon
13 the liability investigation that has been conducted.

14 Q. What impact did the liability decisions
15 have on coverage decisions?

16 A. The investigation and the facts and
17 circumstances that were obtained were reviewed by the
18 ACE claim professionals in reaching -- among other
19 things, in making their determinations as to coverage.

20 Q. In certain -- in certain letters from
21 ACE, in tender response letters, there is information
22 in there that says the mat was in the care, custody
23 and control of Tractor Supply for a certain number of
24 days; do you agree with me on that?

25 A. I do.

1 Q. That information came from ESIS, did it
2 not?

3 A. No, the information -- well, the
4 information came either from Tractor Supply, which
5 would have recorded the receipt of a mat based upon its
6 delivery by UniFirst, or from UniFirst having made the
7 delivery to that particular Tractor Supply retail
8 location.

9 Again, as I said, ESIS did not have any
10 skin in the game with regard to coverage decisions
11 here. It collected the facts, as was its duty and
12 responsibility under its Risk Management Services
13 Agreement with UniFirst, and conducted its activities
14 in accordance with that contract.

15 Q. Because you said that ESIS had no duties,
16 obligations or otherwise with respect to ACE?

17 A. Right.

18 Q. On page 42 of the Report, the conclusion,
19 it says --

20 A. Yes.

21 Q. -- it says: The most appropriate manner
22 in which to examine the appropriateness of the
23 challenged conduct of third-party administrators and
24 its insurance professionals in the handling of
25 insurance claims is not to selectively base an opinion

1 upon individual e-mails, random facts or attempting to
2 interpret selective provisions of an insurance policy
3 without placing everything in context under -- excuse
4 me -- the totality of circumstances.

5 Do you see that?

6 A. I do.

7 Q. What -- what does that -- what do you
8 mean "the totality of circumstances"?

9 A. Looking at everything in a whole as
10 opposed to selectively -- with all due respect to
11 Mr. Fey, in reading his report and his deposition
12 transcript, it appeared as though there were selective
13 things that Mr. Fey was concentrating on or picking out
14 -- cherry picking to make a point.

15 In my view the more appropriate way of
16 doing this is on a more objective basis, to let the
17 chips fall where they may and to examine the entirety
18 of the record as a whole, and under those totality of
19 all the circumstances, to then be able to render an
20 opinion as I have in my Report.

21 Q. Would you agree with Mr. Fey that there
22 are some e-mails that appear problematic?

23 A. No --

24 MR. WARRINGTON: Form.

25 THE WITNESS: -- not -- not when --

1 I am sorry, Al.

2 -- not when you look at everything in the
3 totality of circumstances, no, I do not.

4 BY MR. BELL:

5 Q. Without looking at everything, if you
6 were to pick and choose sort of those random e-mails
7 and things, would you agree that some of those do have
8 the appearance of impropriety?

9 MR. WARRINGTON: Same objection.

10 THE WITNESS: That is a good question,
11 Mark, and here is how I would respond to it.

12 In -- in these type of circumstances you
13 can't look at things in a vacuum, you have to give
14 context and definition to them. I can look at
15 anything that I want and make a determination on
16 something but based upon what is before it or
17 after it, it is entirely wrong. So I have to go
18 and look at everything that I have seen and then
19 be able to render an objective opinion
20 accordingly.

21 BY MR. BELL:

22 Q. Did you -- and did -- you didn't see any
23 e-mails that appeared problematic in your -- in your
24 view?

25 A. No, not under the totality of

1 circumstances or when placed into their proper context.

2 Q. Okay. But taking them out of
3 the totality of the circumstances, just the e-mails
4 standing alone, anything that seemed problematic?

5 A. Again, Mark, as I have testified, I -- I
6 can't do that. I -- I -- I can't just look at one
7 thing and say, oh, this is good or this is bad. I
8 could have equally have said, well, this is wonderful,
9 this explains everything in just looking at that one
10 single document when, in fact, there are a legion of
11 things that came afterwards that give that an entirely
12 different perspective. So, no, in looking at it from a
13 totality of circumstances objectively, I did not see
14 any e-mails that to me were problematic.

15 Q. When looked at in the context of the
16 totality of the circumstances?

17 A. Correct.

18 Q. So let me ask you this. Who -- who
19 should investigate liability determinations on behalf
20 of ACE?

21 A. Well, I think as I have testified, those
22 liability determinations on behalf of a claim that was
23 tendered by Tractor Supply was first and foremost
24 undertaken by ESIS claim professionals in accordance
25 with their duties and responsibilities under the Risk

1 Service Management Agreement.

2 In the event additional information with
3 regard to the acceptance of a tender of defense were
4 required, the ACE claim professional would in all
5 likelihood then undertake that investigation on their
6 own or work through the appointed defense counsel under
7 reservation of rights to further make those
8 investigations and determinations.

9 Q. And then who should make decisions on --
10 based -- or settlement authority -- or sorry let me ask
11 it this way.

12 Who should make settlement decisions
13 involving Tractor Supply as an additional insured?

14 MR. WARRINGTON: Form.

15 THE WITNESS: That would be done by an
16 ACE representative because that is something that
17 had then been tendered and defended under a
18 reservation of rights.

19 BY MR. BELL:

20 Q. And what role would ESIS have in -- in --
21 related to settlement of a Tractor Supply claim as an
22 additional insured?

23 A. In the event there were such a
24 settlement, the ESIS conflict adjustor would pay the
25 defense bills and the liability adjustor in all

1 likelihood would pay the settlement amount in
2 accordance with the instructions and the claims fund
3 that was established by UniFirst.

4 Q. And you said a defense -- I thought you
5 said the conflict adjustor and then the liability
6 adjustor; is that what you said?

7 A. Yes.

8 Q. And the liability adjustor, is that the
9 UniFirst adjustor?

10 A. There are people at UniFirst, like
11 Barbara Christman, who were involved in these type of
12 situations on the denials of claims, but what I am
13 talking about are the ESIS adjustors that are acting on
14 behalf of UniFirst.

15 Q. I gotcha. I gotcha, okay; ESIS adjustor
16 on behalf of UniFirst. All right.

17 So -- so, for instance, if we had a claim
18 -- for instance, there was a settlement involving
19 Mr. -- Mr. Maynard. Are you familiar with
20 the Mr. Maynard claim?

21 A. What was his first name?

22 Q. Jerry?

23 A. Jerry? Jerry Maynard. I remember the
24 name, yes.

25 Q. There was ultimately a settlement that

1 was issued to Mr. Maynard; are you -- are you familiar
2 with that?

3 A. Yes.

4 Q. Okay. So -- and some of the settlement
5 was paid by Tractor Supply, some of it was paid by
6 UniFirst; are you -- are you familiar with that?

7 A. There were joint settlements, yes; there
8 were a number of those, uh-huh.

9 Q. So in that situation, how -- what role --
10 and, for instance, the Maynard case, what role did ESIS
11 have in obtaining settlement dollars for Tractor Supply
12 as an additional insured?

13 A. I would have to go back and look at the
14 file, Mark, and see what the communications were and
15 what the instructions were.

16 Q. How should it have worked?

17 MR. WARRINGTON: Form.

18 THE WITNESS: It depends upon what was
19 known at the time and the settlement decisions
20 that were being conducted at the time.

21 BY MR. BELL:

22 Q. I understand that but as far as under the
23 -- whether it be the -- RMS Agreement or otherwise,
24 how -- how should it -- how should it play out in
25 getting settlement dollars or settlement authority for

1 Tractor Supply as an additional insured?

2 A. If the amount of money --

3 MR. PULLIAM: Object to the form.

4 THE WITNESS: Sorry.

5 -- if the amount of money that was used
6 to settle was within the deductible of UniFirst,
7 the money would be paid out of that deductible
8 fund.

9 BY MR. BELL:

10 Q. And who controls that deductible fund?

11 A. UniFirst.

12 Q. So does the settlement -- the settlement
13 dollars on behalf of Tractor Supply, do they have to
14 come from UniFirst?

15 A. If it is within the \$500,000 or million
16 dollar deductible depending upon the year, it would
17 come out of that claims fund established by UniFirst.

18 Q. And who would make the decision to -- to
19 settle a case for under that \$500,000 deductible
20 amount?

21 A. It depends on the nature of the claim and
22 what was being tendered.

23 Q. In the -- in this situation, in the
24 Maynard situation?

25 A. Again, I would have to go back and take a

1 look at the claim file and see. I don't want to make
2 any suppositions of something that I know exists and
3 will be easily explainable by the documents within the
4 claim file itself.

5 Q. What information would you need to see to
6 be able to make the determination on the Maynard file?

7 A. It is not a determination, it is actual
8 -- just reciting what the facts are from the file of
9 what actually happened.

10 Q. Like -- and when you say "facts from the
11 file," what -- what file are you talking about?

12 A. The Maynard file that we are talking
13 about.

14 Q. Gotcha. But what I am asking is, like,
15 are you talking about the ESIS claim file notes, the
16 ACE claim file notes, the conflict file notes; what are
17 you talking about when you are talking about "the
18 Maynard file"?

19 A. I would look at the documents in the
20 Relativity database and see what the instructions were
21 and how that settlement was agreed to and how it was
22 funded.

23 Q. Okay. And when you say "what the
24 instructions were," what do you mean "what the
25 instructions were"?

1 A. I believe under that -- under the Maynard
2 file that ACE was defending Tractor Supply under a
3 reservation of rights, and in that circumstance the ACE
4 adjustor and the Tractor Supply/Gallagher Bassett
5 folks, if this indeed was one that was settled with
6 joint dollars, would work out who was paying how much
7 and under what circumstances. The releases would then
8 be prepared and exchanged and the dollars would be
9 paid.

10 Q. You said the -- I thought you said the
11 ACE adjustor and Tractor Supply would work out who was
12 paying what; is that what you said?

13 A. Again, I would have to take a look to see
14 in the actual claim file to see how it worked out. All
15 I know from what I remember now is that this was a
16 claim that had been tendered under the additional
17 insured demand by Tractor Supply to ACE which accepted
18 it under a reservation of rights.

19 Q. And when I ask -- and I am not trying to
20 be difficult but when you say you would need to see the
21 claim file, I -- I am wondering what document -- when
22 you say "I need to see the claim file," what -- what
23 claim file do you need to see?

24 A. I wanted to see the entire claim notes
25 and file relating to Mr. Maynard's claim.

1 Q. So the entire claim notes and file from
2 ESIS, UniFirst, Tractor Supply or from whom?

3 A. From what I recall there are -- there
4 were three claims that were set up in Mr. Maynard's
5 situation: One from ESIS, one from ACE and one by
6 Gallagher Bassett. I would go back to each of those
7 individual claim files and take a look to answer your
8 question as to how that claim was amicably resolved and
9 what the instructions were and how much each of the
10 parties paid to fully indemnify his claim, in addition
11 to the conflict file.

12 Q. So -- so you have some recollection of
13 the Maynard file?

14 A. Only that it exists. And from what I
15 have just told you, that's the best recollection I have
16 for you.

17 Q. And do you have any recollection of it
18 being settled ultimately for \$600,000?

19 A. Not off the top of my head, sorry, I
20 don't.

21 Q. Okay. Assuming for the sake of argument
22 it was settled for \$600,000; 300,000 paid by UniFirst,
23 300,000 paid by Tractor Supply, how -- what -- what
24 role would ESIS have in getting money from ACE to pay
25 that settlement amount?

1 MS. CHRISTOPHER: Objection, form.

2 MR. WARRINGTON: Same.

3 THE WITNESS: I don't know that ESIS had
4 money that was paid by ACE because that \$300,000
5 would still fall within the UniFirst deductible
6 but, again, I can't make any speculations without
7 taking a look at the file itself and giving you a
8 proper answer.

9 MR. BELL: Let's -- if we can, can we go
10 off the record for five minutes; come back at
11 11:30?

12 THE WITNESS: Sure.

13 THE VIDEOGRAPHER: We are off
14 the record -- off the record at 11:24.

15 (Whereupon a break was held.)

16 THE VIDEOGRAPHER: We are returning to
17 the record, the time is 11:34 a.m.

18 BY MR. BELL:

19 Q. Thanks -- thanks for staying with us,
20 Mr. Heinze.

21 A. Sure, Mr. Bell.

22 Q. A question for you, on the -- did you
23 review the expert report of Mr. Rambin?

24 A. Yes, as well as his deposition.

25 Q. Okay. He takes the position that if

1 something is rented then there is no coverage under the
2 CGL policy, did you -- did you see that?

3 A. I did.

4 Q. What is -- what is your thought related
5 to that position?

6 A. I don't have a thought on the position
7 because I was not requested to review any kind of
8 coverage determinations or interpret the policy, so I
9 have no opinion on that at all.

10 Q. But as a, you know, guy who has been
11 doing this for 30-plus years, what are your -- what are
12 your thoughts on it?

13 A. It is outside the scope of my retention,
14 Mark, with respect -- and, therefore, I don't have any
15 comment or opinion on it.

16 Q. Have you ever seen that position taken
17 before by an insurer, that if something is rented there
18 is no CGL coverage and it is not your product?

19 MR. WARRINGTON: Object to the form.

20 MR. PULLIAM: It mischaracterizes the
21 testimony.

22 THE WITNESS: It would require me to look
23 at coverage interpretations and the different
24 wordings of different policies written by
25 different insurers at different times based upon

1 different claims and facts of those claims and the
2 allegations that are made within the complaints of
3 additional insured tenders that are being made.

4 So it would depend upon a variety of factors that
5 I just don't have before me and I am not able to
6 make any further comment or opinion on that.

7 BY MR. BELL:

8 Q. Well, it -- it wouldn't require you to
9 look at a bunch of different forms or anything, I don't
10 think --

11 A. Well, you have asked me if I have seen it
12 before so --

13 Q. Yeah.

14 A. -- again, under various circumstances
15 over the past 40 years I don't -- I don't know whether
16 it is something that I would have seen before but it is
17 nothing that I have been asked to opine upon and it is
18 beyond the scope of my retention.

19 Q. Okay. Because you agree with me that
20 this is a standard ISO CG 00 01 form, right, that's at
21 issue?

22 A. 00 01 CGL ISO form, that is the one that
23 is at issue, yes.

24 THE COURT REPORTER: CG, I am sorry,
25 what?

1 THE WITNESS: CG 00, and then a space,
2 and then 01.

3 THE COURT REPORTER: Thank you.

4 THE WITNESS: Uh-huh.

5 BY MR. BELL:

6 Q. And -- and the your-product language is
7 unmodified standard ISO CGL language, right?

8 A. Again, I'll have to go back and take a
9 look to see what endorsement was used with regard to
10 the your-product and your-work exclusions but there are
11 definitions within the policy that are standard ISO
12 wordings.

13 Q. And I am just -- and I -- I am just
14 asking if you have ever seen that -- that or a similar
15 position taken before, that a rented product is not
16 your product under the ISO CGL definition?

17 MR. PULLIAM: Object to the form.

18 THE WITNESS: Again, Mark, respectfully
19 it is not anything that I have been asked to
20 comment or opine upon and is beyond the scope of
21 my retention, so I don't have any comment or
22 opinion upon that at this time.

23 BY MR. BELL:

24 Q. I am just asking in 30 years if you have
25 ever seen it before, I am not asking you whether you

1 agree -- and this question is not asking whether you
2 agree with Mr. Rambin or otherwise, I am just asking
3 you if you have ever seen that position taken
4 previously.

5 MR. WARRINGTON: Form.

6 THE WITNESS: Again, it is outside the
7 scope of my Report and opinion, outside the scope
8 of my retention, and I don't have any comment or
9 opinion further with regard to over the past 40
10 years whether I have ever seen a position like
11 that taken before.

12 BY MR. BELL:

13 Q. So you have reserved the right to
14 supplement the Report based on coverage
15 interpretations, right?

16 A. I have reserved my right to supplement or
17 amend my Report based upon any item that counsel may
18 wish me to opine upon.

19 Q. And you mentioned that one of the things
20 that you had reserved your right to supplement your
21 Report is if Mr. Fey is allowed to testify as to
22 coverage, right?

23 A. Correct.

24 Q. Okay. And so what I am asking you is if
25 you are to supplement your Report based -- and to opine

1 on the opinion of Mr. Rambin, what would your position
2 be?

3 A. I have not been asked to render that
4 opinion at this time and it is outside the scope of my
5 retention, so I would have to go back and take a look
6 and conduct that research and make that determination
7 based upon my experience, training and knowledge.

8 Q. What research would you need to do?

9 A. I would need to take a look at what
10 Mr. Rambin had said, take a look at the policy
11 interpretation, conduct some legal research as to
12 whether the common law of Florida or Tennessee have had
13 any other types of interpretations of that wording and
14 put it into the context of how Mr. Rambin has used it
15 in his opinion and in his deposition testimony.

16 Q. And you said you would rely on your
17 30-plus years of experience?

18 A. Yes.

19 Q. And that's what I am asking you, based
20 upon your 30-plus years of experience, nothing is going
21 to change between whether you have been asked to opine
22 on that or not. But based on your experience, what is
23 your -- what is your position with respect to whether a
24 rented product is your work?

25 A. As I have testified, Mark, I don't have

1 any opinion on that at this time. I would have to go
2 back and formulate those opinions based upon a more
3 intensive review of the information and the documents
4 that would enable me to support that opinion under the
5 totality of circumstances.

6 Q. Do you know Mr. Rambin?

7 A. Yes.

8 Q. And how do you know Mr. Rambin?

9 A. By reputation.

10 Q. Do you know him personally?

11 A. No.

12 Q. How -- how do you know him by reputation?

13 A. As a coverage counsel who is known in the
14 insurance industry.

15 Q. I assume a positive impression?

16 A. Yes.

17 Q. I put into your folder Exhibit 415. Can
18 you open that up and take a look.

19 A. Sure. Do you want me to page all the way
20 to the bottom, or what would you like --

21 Q. Yeah, if you would just so you are
22 familiar with it. Let me ask you if -- and let me know
23 if you remember that document when you are reviewing
24 it.

25 A. I do remember the document.

1 Q. Okay.

2 MR. WARRINGTON: Excuse me, Mark, sorry
3 to interrupt, I don't see a sticker on it. Is
4 it --

5 MR. BELL: There is not a sticker on it.

6 MR. WARRINGTON: Oh, okay.

7 MR. BELL: You are right. It had been
8 previously marked Exhibit 415 but it does not
9 appear that there is a sticker on it, but it is
10 ESIS 19202.

11 THE WITNESS: I remember seeing this,
12 Mark.

13 BY MR. BELL:

14 Q. You do?

15 A. Yes.

16 Q. Okay. And what -- what do you remember
17 about it?

18 A. That I have seen it.

19 Q. Okay. This is on the Downey claim; are
20 you familiar with the Downey claim?

21 A. I am familiar with the fact that
22 Mr. Downey made a claim, yes.

23 Q. Are you familiar with the settlement of
24 the Downey claim?

25 A. Not off the top of my head but I do

1 recall that Mr. Downey's claim did resolve.

2 Q. Then this one -- the -- I think I
3 mentioned -- I mentioned Maynard earlier but Maynard
4 was also settled but Downey is a different claim that
5 was settled. And do you recall that Downey was settled
6 for \$600,000?

7 A. Not specifically, no.

8 Q. Okay. Please scroll down to the bottom
9 of page 19207.

10 A. Yes.

11 Q. And that's the first e-mail, it is an
12 e-mail from Steve Beach to Bill Ruskin; do you see
13 that?

14 A. Yes, yes.

15 THE COURT REPORTER: I am sorry, to who?

16 MR. BELL: Bill Ruskin.

17 BY MR. BELL:

18 Q. And do you -- do you know who Mr. Beach
19 is?

20 A. A senior claims representative at ESIS.

21 Q. And is he handling the conflict file?

22 A. I don't recall.

23 Q. And, again, we see Steve Beach's e-mail,
24 Senior AGL Claims Representative, and it says: ESIS on
25 behalf of ACE American Insurance.

1 Do you see that?

2 A. I do.

3 Q. And why did Mr. -- why would this
4 language be on there, ACE on behalf of -- or "ESIS on
5 behalf of ACE American Insurance"?

6 A. I think just like in the e-mail we saw a
7 little bit earlier with regard to Ms. Flagg, it was
8 either based upon a regulatory requirement to advise
9 what statutory insurer is insuring the entities or it
10 was just a mistake.

11 Q. And do you know who Mr. Ruskin is?

12 A. I believe he was the attorney on the
13 case.

14 Q. That's right, yeah. The attorney for
15 Tractor Supply?

16 A. I believe that's correct, yes.

17 Q. And then the first e-mail says: Bill,
18 try Chubb rep below, Nicholas D. Maxymuik, Esq.

19 Do you see that?

20 A. Yes.

21 Q. Okay. All right. Then if you scroll up
22 to the next e-mail, it starts on -- on 19205. Let me
23 know when you are there.

24 A. I am there.

25 Q. Okay. It is an e-mail from Bill Ruskin

1 to Nick Maxymuk at Chubb.

2 A. Yes.

3 Q. Okay. So this is on June 20th, 2023?

4 A. Yes.

5 Q. So --

6 A. 2022.

7 Q. What did I say?

8 A. '23.

9 Q. Ah, thank you, yes, 2022.

10 Do you see the second paragraph there?

11 A. Yes.

12 Q. It says: The purpose of our call will be
13 to discuss whether Chubb would be willing to contribute
14 to a settlement of the case without prejudice to its
15 reservation of rights and its coverage position.

16 And it says, the next paragraph:

17 The co-defendant in the case in UniFirst Corporation,
18 which is also being defended by Chubb but with no
19 reservation of rights. Plaintiff's demand in the case
20 is an inflated 1.25 million to both defendants.

21 Do you see that?

22 A. Okay, sorry, you -- you skipped to the
23 next paragraph; is that right?

24 Q. That's right, yes.

25 A. Okay, yes.

1 Q. And so this would be the -- the demand
2 would exceed the self-insured retention, right?

3 A. There is no self-insured retention --

4 Q. Sorry.

5 A. -- it was a high deductible program.

6 Q. Correct, thank you. But it would exceed
7 the deductible, right?

8 A. That's right.

9 Q. Okay. And so when a claim like this is
10 exceeding the deductible, what role does ESIS have with
11 respect to obtaining settlement dollars for, for
12 instance, the Downey claim on behalf of Tractor Supply?

13 A. Well, that's -- if -- if this is a tender
14 that has been accepted as it appears, the defense was
15 under reservation of rights, it would be ACE that is
16 making that determination with regard to whether the
17 matter can be amicably resolved based upon the
18 allegations that are contained within the plaintiff's
19 complaint, which is why they would have accepted the
20 tender under reservation of rights in the first place.

21 Q. So -- so would ACE make the decision as
22 to the amount of settlement dollars to pay?

23 A. Well, I --

24 MR. WARRINGTON: Form.

25 THE WITNESS: I am sorry, Al.

1 MR. WARRINGTON: Object to the form.

2 THE WITNESS: It would be something --

3 again, I would have to take a look at the entirety
4 of the file, Mark, but it would be something that
5 in all likelihood would have been done in
6 conjunction with also defense counsel that was
7 appointed under the reservation of rights and a
8 review of the demands that were being made and the
9 various specials in the claim that are being
10 asserted and whether a matter could be amicably
11 resolved based on those circumstances.

12 BY MR. BELL:

13 Q. And then as far as if the settlement was
14 below \$500,000, who would determine the amount of money
15 to pay on behalf of Tractor Supply towards that
16 settlement?

17 A. Again, I would have to take a look at the
18 claim file to see what the discussions were among the
19 parties, but if Tractor Supply in conjunction with
20 Gallagher Bassett decided what they would want to
21 contribute, if anything, or -- and/or if they wanted to
22 have the ACE adjustor -- a conflict adjustor determine
23 in the ongoing discussions with counsel what the
24 appropriate amount would be, those would be the types
25 of communications that would be taking place.

1 Q. Okay. And what role would ESIS have in
2 those discussions, if any?

3 A. I am not aware that they would have any
4 role in those discussions because their duties and
5 responsibilities run to UniFirst with regard to the
6 review of the liability that UniFirst might have with
7 regard to Mr. Downey's claim.

8 Q. And what I am trying to understand is, I
9 thought you had said earlier, and I might have just
10 misunderstood, that UniFirst makes the decisions for
11 amounts under \$500,000; is that -- is that right?

12 A. It depends --

13 MR. PULLIAM: Object --

14 THE WITNESS: I am sorry.

15 MR. PULLIAM: Objection to form.

16 THE WITNESS: -- it depends on whether
17 there is a tender of an additional insured status
18 that is being requested by Tractor Supply. ESIS
19 has a certain amount of monetary settlement
20 authority under the RMS Agreement that it can use
21 to settle claims on behalf of UniFirst. Over
22 those amounts, and within its deductible, UniFirst
23 makes those determinations.

24 In this situation where it appears there
25 has been a tender of an additional insurance

1 status request and accepted by ACE under a
2 reservation of rights, ACE would certainly be
3 involved in making those discussions with regard
4 to how much to contribute on behalf of UniFirst
5 towards settlement.

6 BY MR. BELL:

7 Q. Okay -- but I hear what you are saying.
8 And, again, assuming the situation is a tender of AI
9 status, it has been defended under reservation of
10 rights, I thought you had said that -- that ACE would
11 be involved with respect to the settlement as to
12 UniFirst?

13 A. Yes.

14 Q. But what about --

15 MR. PULLIAM: Object to the form.

16 THE COURT REPORTER: Who just said that?

17 MR. PULLIAM: Andy Pulliam.

18 BY MR. BELL:

19 Q. But with respect to Tractor Supply, what
20 role would UniFirst have?

21 A. If the additional insured tender has been
22 accepted by ACE under a reservation of rights, ACE
23 would be involved in making those decisions, and in its
24 discussions with UniFirst as I have seen within the
25 file where those communications are taking place.

1 Q. ACE would discuss with UniFirst the
2 amount to pay on behalf of Tractor Supply in a
3 settlement?

4 MR. PULLIAM: Object to the form.

5 THE WITNESS: Again, I have to go back
6 into the file and see exactly what was done in
7 this situation and who made settlement
8 communications and where the authorities were and
9 to whom they were given.

10 BY MR. BELL:

11 Q. Okay. So looking at this -- so in
12 Downey -- let's just talk about Downey specifically.
13 Downey is a case where ACE is defending under a
14 reservation of rights, right?

15 A. Pursuant to the allegations set forth in
16 Mr. Downey's Complaint.

17 Q. Right. So in the Downey situation, what
18 role would ESIS have in determining the settlement
19 amount payable on behalf of Tractor Supply by ACE?

20 MR. WARRINGTON: Object to the form.

21 THE WITNESS: Again, to answer the
22 question specifically, I would go back to the file
23 and determine what the file shows with regard to
24 the communications between the parties that are
25 involved. In this situation, however, since

1 ESIS's responsibilities under the RMS Agreement
2 run solely to UniFirst corporation, in all
3 likelihood it would not be involved in making
4 determinations as to how much settlement authority
5 should be contributed on behalf of Tractor Supply
6 in its role as a prospective additional insured
7 under the ACE policy under a reservation of
8 rights.

9 BY MR. BELL:

10 Q. And, again, you would need to see the
11 file from ESIS and the file from Tractor Supply?

12 A. And from ACE.

13 Q. And from ACE.

14 A. And in all likelihood, since it relates
15 to Tractor Supply, I believe, if I am not mistaken,
16 there was also a Gallagher Bassett file that was also
17 established.

18 Q. All right. So scrolling up in this
19 e-mail, go to the next e-mail from Bill Ruskin, June
20 24th at 4:12; do you see that?

21 A. Yes.

22 Q. It says: Hi Nicholas, I am available
23 this coming Monday or --

24 THE COURT REPORTER: I am sorry. I am
25 sorry, Mark, I am having a really tough time with

1 those.

2 MR. BELL: Yeah.

3 BY MR. BELL:

4 Q. He says, the second sentence: If there
5 is someone else at ACE -- Chubb/ACE that I should be
6 speaking with about the settlement of this matter on
7 behalf of Tractor Supply Company, an additional named
8 insured on your policy, kindly advise me.

9 Do you see that?

10 A. I do.

11 Q. So Mr. Ruskin here is asking the Chubb
12 representative for settlement authority, right?

13 MR. WARRINGTON: Form.

14 THE WITNESS: No, what he is saying is
15 that he is available to speak with him on either a
16 following Monday or Tuesday afternoon since
17 e-mails were written on a Friday. But if there
18 was someone else at the insurance company that he
19 should be speaking with about the settlement on
20 behalf of Tractor Supply, that he would like to be
21 informed of that.

22 BY MR. BELL:

23 Q. The next e-mail is from Mr. Maxymuk to
24 Mr. Beach.

25 A. Yes.

1 Q. Do you see that?

2 A. Yes.

3 Q. He says: Steve, I need to talk to you
4 about -- first about this claim before speaking with
5 Mr. Ruskin. I have called and left a message on your
6 voicemail. Call me Monday so I can discuss this newly
7 assigned claim to me first and then I will reach out to
8 Mr. Ruskin depending upon our conversation. Depending
9 upon my initial conversation with Steve, it may be
10 beneficial for the three of us to have a phone call.

11 Do you see that?

12 A. I do.

13 Q. Why -- if ESIS's role is just monitoring
14 the claim, as you said it was in a conflict file,
15 right?

16 A. And to -- and also for the conflict
17 adjustor to pay the bills.

18 Q. Pay the bills, okay.

19 Why would Chubb need to speak with ESIS's
20 conflict adjustor in this matter?

21 A. Well, I think you need to read the second
22 -- the next part of the e-mail here where he says:
23 Steve - is this case still well within the \$500KSIR --
24 which is not correct -- and if so, what is the reason
25 for my involvement at this stage. I was just

reassigned this claim and want to get the "lay of the land" by my conversation first with the insured's TPA, close quote.

So here Mr. Maxymuk is clearly stating that he wants to get more information, get the lay of the land, understand a little bit more before he has the conversation with Gallagher Bassett.

Q. And if the claim was within the \$500,000 SIR, who would make the determination as to settlement dollars on behalf of Tractor Supply in the Downey case?

MR. PULLIAM: Object to the form.

THE WITNESS: Again, as I have testified before, Mark, my understanding is that where ACE has agreed to accept a tender of an additional insured under a reservation of rights based upon the allegations set forth within that claimant's complaint, the decision with regard to settlement and the nature and extent of settlement would be undertaken by ACE.

BY MR. BELL:

Q. Okay. Got it.

So that -- that -- that's the case even if the amount of settlement to be paid is within the \$500,000 deductible?

MR. PULLIAM: Object to the form.

1 THE WITNESS: In the event that there has
2 been an additional insured tender, an acceptance
3 of that tender under a reservation of rights,
4 that is my understanding.

5 BY MR. BELL:

6 Q. And that's your understanding of -- of
7 what happened or what should have happened or both?

8 A. That's my understanding of what happened.

9 Q. And what -- what -- from industry
10 perspective, what should happen?

11 A. Well, that depends upon what the nature
12 and extent of the contractual responsibilities and
13 duties are of the third-party administrator and any of
14 the general liability special handling instructions
15 they may have been provided, and the instructions they
16 have been given. It also depends upon the nature and
17 extent of the coverage evaluation that is conducted by
18 the insurance carrier based upon the allegations set
19 forth in the claimant's complaint and whether or not
20 they wish to accept that tender based upon a
21 reservation of rights.

22 Q. Okay. But you -- you said that the
23 contractual obligations and everything, you know what
24 all of those contractual obligations are in this case,
25 right?

1 A. Yes.

2 Q. Okay. And so, what -- so what -- I am
3 asking again, what -- that is -- you described what did
4 happen in this situation, and then what I am asking is
5 what should happen in the typical -- the typical
6 situation involving this type -- in this type of
7 situation?

8 A. Exactly what happened here.

9 Q. Okay. All right. And then the next
10 e-mail is from Mr. Ruskin to Mr. Maxymuk on June 25th,
11 2022; are you with me on that one?

12 A. I am.

13 Q. So the second paragraph says: As I
14 understand it, the applicable ACE policy does not have
15 an SIR, but rather has a deductible under the policy
16 that applies to this 1/26/18 date of loss.

17 And it continues, and then it picks up
18 again: Regardless, it is a deductible...

19 Do you -- do you see that?

20 A. I do.

21 Q. "Regardless, it is a deductible to be
22 reimbursed solely by UniFirst after the claim is over,
23 not a self-insured retention as you referenced below.
24 I just wanted to clear that up and make sure that you
25 appreciate that ACE's obligations to Tractor Supply

1 Company exists now and they are not in any way affected
2 by any deductible that UniFirst owes as reimbursement
3 under the policy."

4 Do you see all of that?

5 A. I do.

6 Q. Do -- do you agree with Mr. Ruskin's
7 statement there?

8 A. As to what, that this is not a
9 self-insured retention? I do agree with that and
10 that it is a deductible and that the obligations of ACE
11 are not affected by the deductible program. It is just
12 a matter that, as he says in that last sentence: In
13 other words, Tractor Supply Company is entitled to
14 additional insured coverage from ACE as determined by
15 ACE, not UniFirst.

16 Q. Got it, okay.

17 And then he concludes it by saying: I am
18 requesting settlement authority from ACE on behalf of
19 Tractor Supply Company.

20 Do you see that?

21 A. I do.

22 Q. And ultimately -- ultimately ACE then
23 would make the decision of what dollars to pay on
24 behalf of Tractor Supply in a settlement under
25 the policy; is that right?

1 A. Yes.

2 Q. Okay. And ESIS would not have any role
3 in that; is that right?

4 A. First of all, let me just go back. Under
5 a reservation of rights they would do that, correct.

6 Q. Sure.

7 A. And ESIS would have no role in that.

8 Q. Okay. Got it, all right.

9 Did you -- in your Report, did you -- do
10 you have any opinions with respect to the claims
11 handling done by ACE?

12 A. No, I was not asked to look at that and
13 that would be beyond the scope of my retention. My
14 retention was specifically, as I described in my
15 report, to look at the entirety of the record and to
16 render an objective view as to whether the actions and
17 conduct of ESIS and its claim professionals were within
18 the generally accepted insurance industry customs and
19 practices and the standard of care.

20 Q. Okay. All right. And so, then -- then
21 if I ask you any questions about the -- ACE's handling,
22 would you -- what would be your response?

23 A. That it would be beyond the scope of my
24 retention.

25 Q. And if I asked you, hey, based on your

1 experience of 30 years and everything else, would that
2 be your -- your response?

3 A. Yes.

4 Q. Okay. You had mentioned earlier the
5 right to supplement your Report. Is there -- based on
6 our discussions is there anything that you intend to
7 supplement?

8 A. As a matter of fact there is; thank you
9 for asking.

10 If -- can I refer you, Mark, to page 40
11 of my Report.

12 Q. Yes.

13 A. Let me know when you are there.

14 Q. I am there.

15 A. Okay. That first large bullet point,
16 there is a sub bullet that starts "the record
17 documents"; do you see that?

18 Q. I do.

19 A. If I go down to the sentence that starts
20 on the left-hand margin "that the ACE policy with
21 Tractor Supply," Tractor Supply should say UniFirst.

22 Q. I gotcha, okay. That the ACE policy --
23 yeah, understood.

24 A. I made a typographical error there, I am
25 sorry.

1 Q. No worries.

2 Is there anything else that you would
3 like to supplement as of now?

4 A. Not at this time, thank you.

5 Q. Do you anticipate supplementing your
6 report?

7 A. It would depend upon my further
8 conversations with counsel and what they would ask me
9 to do, and if that were to happen then I am sure we
10 would have the opportunity of seeing one another again.

11 Q. Okay. And as of now you are not going to
12 be opining on anyone else's potential liabilities other
13 than ESIS; is that correct?

14 A. Correct.

15 Q. And you are not going to be opining on
16 the strength of anyone else's defenses against Tractor
17 Supply or the strength of the claims by Tractor Supply
18 by other defendants; is that correct?

19 A. Correct.

20 Q. Okay. So everything -- all of your
21 testimony is going to be exclusively limited to ESIS's
22 role and what they did, right or wrong; is that right?

23 A. That's correct.

24 Q. And it is not going to be related to
25 policy interpretation, unless supplemented?

1 A. Correct.

2 Q. And it is not going to be related to
3 ACE's claims handling?

4 A. Correct.

5 Q. And it is not going to be related to
6 UniFirst's conduct?

7 A. Correct.

8 Q. Or anything related to UniFirst's
9 Counterclaim?

10 A. Correct.

11 MR. BELL: All right. Then that is --
12 Mr. Heinze, I appreciate the time, that is
13 everything that I believe I have.

14 THE WITNESS: Pleasure being with you,
15 Mark. Thank you for your courtesies.

16 MR. BELL: Thank you.

17 We will do the swearing off the record.

18 THE VIDEOGRAPHER: Any other questions?

19 MR. PULLIAM: Yeah, I have got some.

20
21 EXAMINATION

22 BY MR. PULLIAM:

23 Q. Mr. Heinze, this is Andy Pulliam. I
24 represent UniFirst, and I have got some questions,
25 hopefully it won't be that long but --

1 A. Hi, Andy.

2 Q. Mr. Bell just asked you about you are not
3 going to testify about policy interpretations but he
4 asked you a lot of questions that involved policy
5 interpretations, so I think that would negate a lot of
6 those answers.

7 Let me -- including the following: He
8 asked you a lot of questions about settlement
9 authority, and you testified, and correct me if I am
10 wrong, that settlement authority would come from ACE
11 whenever a reservation of rights letter -- after a
12 tender but a reservation of rights letter was issued;
13 is that correct what you said?

14 A. That's my understanding, yes.

15 Q. Wouldn't settlement authority only come
16 from ACE after the duty to indemnify was found by ACE?

17 A. Of course.

18 Q. Okay. So if the duty to indemnify was
19 never found by ACE regarding any of these 61 claims,
20 ACE would never have had any duty to provide any
21 settlement authority, correct?

22 A. Correct.

23 Q. Okay. So in this Downey case he was just
24 asking you about, the Maynard case he asked you about,
25 are you aware of whether or not a duty to indemnify was

1 ever found -- a duty to indemnify Tractor Supply was
2 ever found?

3 A. I don't recall seeing that in the files.

4 Q. Okay. If I represent to you that a duty
5 to indemnify was not found in any of the 61 underlying
6 claims, including the two that weren't in fact tendered
7 so obviously there could be no indemnity, but if I
8 represent to you in the 59 claims that Tractor Supply
9 actually did tender that a duty to indemnify was never
10 found by ACE -- take that assumption, that a duty to
11 indemnify was never found by ACE regarding any of those
12 59 claims that were tendered, would ACE have had any
13 responsibility to pay any settlement funds, even if it
14 was in the deductible?

15 A. No.

16 Q. All right. Let's see. I believe you
17 said that in litigation matters -- you referenced
18 eight, I'll say, are you aware that the eight
19 involved -- included the Earlene Brown one that was
20 never tendered?

21 A. That is correct, yes.

22 THE COURT REPORTER: I am sorry, what was
23 the name of that?

24 MR. PULLIAM: Earlene Brown.

25 THE WITNESS: Earlene Brown,

1 E A R L E N E , Brown.

2 THE COURT REPORTER: Thank you.

3 BY MR. PULLIAM:

4 Q. So the -- in the litigation matters where
5 ACE provided a defense under a reservation of rights,
6 the liability investigation by ESIS in all of those
7 indicated that UniFirst was not liable; are you aware
8 of that?

9 A. Yes, I believe Ms. Brown's claim was
10 settled by Tractor Supply without a tender.

11 Q. Right, but I am talking about the ones --
12 the other seven, and just FYI, Maynard, Padaway,
13 Atkinson, Perryman, Bell, Downey, Holderness --

14 A. And what is your question with regard to
15 them, Andy, again?

16 Q. I am about to get to it.

17 A. Okay.

18 Q. In those seven litigation matters where
19 ACE provided defense under a reservation of rights, are
20 you aware that ESIS found no liability on behalf of
21 UniFirst?

22 A. I believe that is correct, yes.

23 Q. All right. I thought you testified that
24 the reservation of rights was issued because the
25 liability investigation by ESIS indicated that damages

1 may have resulted from UniFirst mats?

2 A. No, if I -- if I testified to that,
3 that's incorrect.

4 Q. Okay.

5 A. The reservation of rights, as I think I
6 have testified, was based upon the allegations set
7 forth within the claimant's complaint.

8 Q. Right. In fact, are you aware that none
9 of ESIS's investigations of these underlying claims
10 found any potential liability of UniFirst?

11 A. I believe that is also correct based upon
12 my review of the claim files.

13 Q. Mr. Bell had asked you if -- who did the
14 investigations of claims, and he asked you if the
15 investigation of claims was done by ESIS and I believe
16 you said yes, you said yes on behalf of UniFirst?

17 A. Correct.

18 Q. Wasn't there also another TPA, i.e.,
19 Gallagher Bassett, who did investigations of Tractor
20 Supply's claims?

21 A. Yes. As I have testified, there was a
22 collection of information that ESIS would have
23 collected both from Gallagher Bassett and its own
24 investigations.

25 Q. And -- and Tractor Supply either directly

1 or through Gallagher Bassett could have provided any
2 facts it wanted to to ACE, correct?

3 A. Yes, but I don't remember seeing, as I
4 have testified, any objection or any declaratory
5 judgement action or anything else filed by Tractor
6 Supply with regard to any of those matters.

7 Q. Well, do -- do you recall seeing any
8 response by Gallagher -- do you recall the tender --
9 tender letters -- or I am sorry, the tender response
10 letters from ACE going to Gallagher Bassett; do you
11 recall those?

12 A. I do.

13 Q. Do you recall those, all of them, in
14 fact, saying we are aware of no negligence or defect
15 which caused or contributed to the incident?

16 A. That's correct.

17 Q. Are you aware of any Gallagher Bassett or
18 Tractor Supply claim to ACE after any of those tender
19 response letters saying here is additional facts which
20 we think shows the negligence or defect of the mat?

21 A. I have not seen any of those
22 communications in the claims files that I have
23 reviewed.

24 Q. But Tractor Supply through Gallagher
25 Bassett was invited to provide such facts, was it not?

1 A. It was, yes.

2 Q. All right, last topic I am going to ask
3 about is -- Mr. Bell asked you about "resulted from"
4 means -- and if I am not mistaken, you originally said
5 that it means that it caused the incident or accident;
6 do you recall that?

7 A. I do.

8 Q. Then he and you talked about the
9 difference between a mat precipitating an incident or a
10 mat being involved in an incident; do you recall that
11 discussion?

12 A. I do.

13 Q. Now I want to ask you to be clear because
14 I am confused by your prior testimony. If a mat
15 precipitated an incident, would that be "resulting
16 from"?

17 A. No.

18 Q. Well, if a mat was involved in an
19 incident --

20 A. It potentially could be. But, again,
21 that would require me to render a legal opinion which I
22 have not been asked to do.

23 Q. Okay. Okay. So all of those questions
24 about what "resulting from" means, that is actually --
25 you would consider that to be a legal opinion?

1 A. I would, yes.

2 MR. PULLIAM: Okay. That's all I have.

3 THE WITNESS: Thanks, Andy; good to see
4 you.

5 MR. BELL: Quick follow-up if I can,
6 Andy.

7

8 REEXAMINATION

9 BY MR. BELL:

10 Q. I just -- just want to make sure I -- I
11 am clear. I thought you had testified earlier that
12 "resulting from" means involved in precipitating the
13 result?

14 MR. PULLIAM: Object to the form, that is
15 the confusion that I was testifying -- I was
16 asking about.

17 THE WITNESS: And if I was confusing, I
18 apologize, counsel. It is not my intent to render
19 legal opinion here. I want to stay away from the
20 legal opinions and leave that discussion to you
21 all to undertake with the Court.

22 BY MR. BELL:

23 Q. All right. I am with you -- I am just
24 trying -- I guess -- I guess -- I guess we have got the
25 record but I guess maybe I am equally confused then,

1 but that's all I have got.

2 MR. PULLIAM: Nothing further from me.

3 MS. CHRISTOPHER: Nothing from me.

4 MR. WARRINGTON: Mr. Heinze, I have
5 nothing either, thank you very much.

6 THE WITNESS: Thank you, Al; good to see
7 you.

8 MR. BELL: Thanks, guys.

9 THE WITNESS: Kelly, David, thank you
10 very much for your help today.

11 THE VIDEOGRAPHER: That concludes today's
12 testimony. We are off the record at 12:14 p.m.

14 (Off the Record at 12:14 p.m.)

1 C E R T I F I C A T E

2 STATE OF TENNESSEE

3 COUNTY OF KNOX

4
5 I, Kelly Forfar, LCR #833, Licensed Court
6 Reporter in and for the State of Tennessee, do hereby
7 certify that the above deposition was reported by me
8 and that the foregoing 134 pages of the transcript are
9 a true and accurate record to the best of my knowledge,
10 skills, and ability.

11 I further certify that I am not related to nor
12 an employee of counsel or any of the parties to the
13 action, nor am I in any way financially interested in
14 the outcome of this case.

15 I further certify that I am duly licensed by
16 the Tennessee Board of Court Reporting as a Licensed
17 Court Reporter as evidenced by the LCR number and
18 expiration date following my name below.

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20
21 Kelly Forfar

22 Kelly Forfar, LCR# 833

23 Expiration Date: 6/30/24

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25 Page 135

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2 Bernd G. Heinze (#5672897)

3 ACKNOWLEDGEMENT OF DEPONENT

4 I, Bernd G. Heinze, do hereby declare that I
5 have read the foregoing transcript, I have made any
6 corrections, additions, or changes I deemed necessary as
7 noted above to be appended hereto, and that the same is
8 a true, correct and complete transcript of the testimony
9 given by me.

10
11 _____ Date
12 Bernd G. Heinze

13 *If notary is required

14 SUBSCRIBED AND SWORN TO BEFORE ME THIS
15 _____ DAY OF _____, 20____.

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Tennessee Rules of Civil Procedure
Depositions Upon Oral Examination
Rule 30

Rule 30.05: Submission to Witness; Changes;
Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition

may then be used as fully as though signed unless on a motion to suppress under Rule 32.04(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

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